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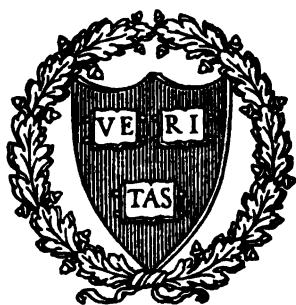
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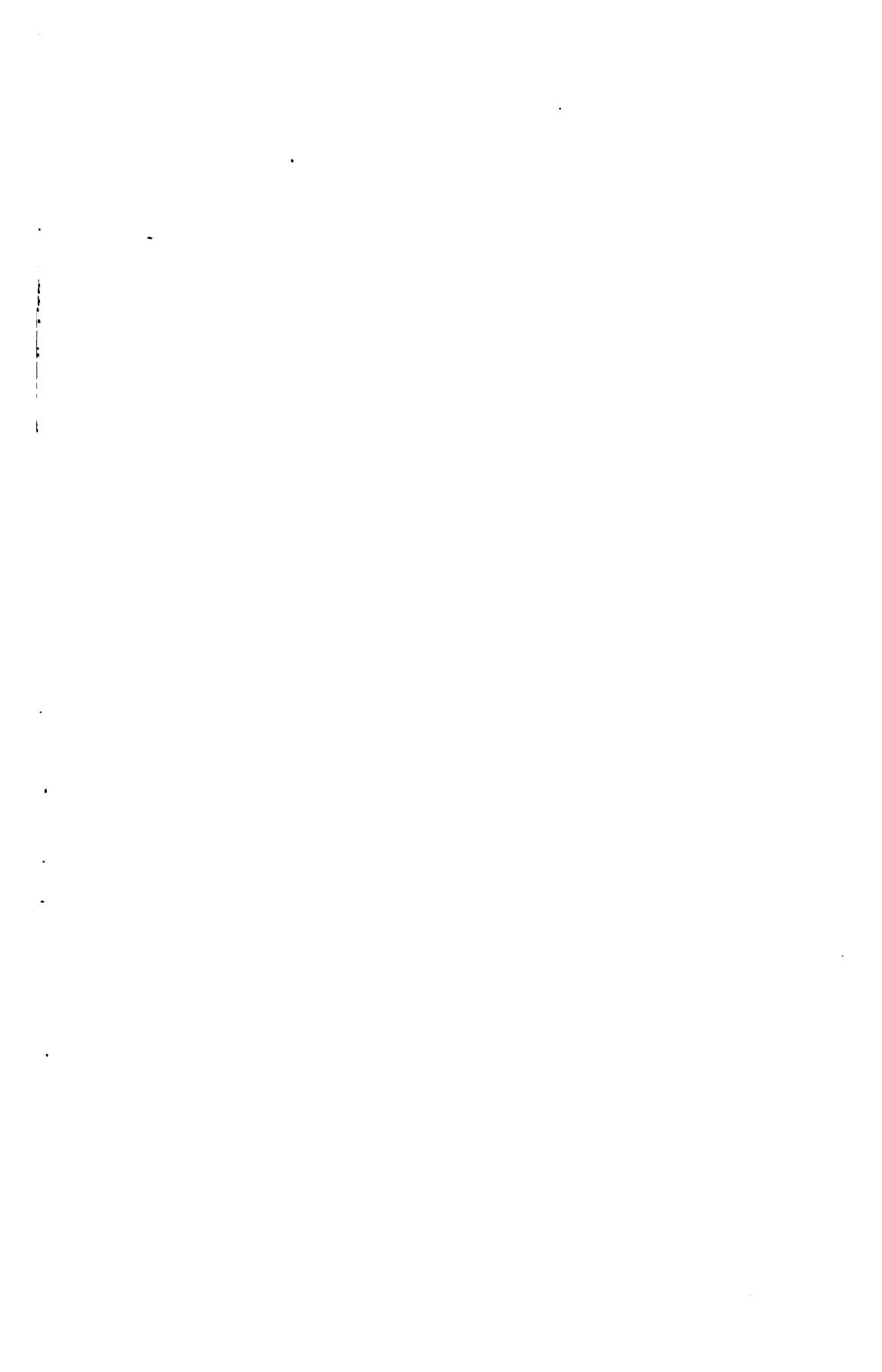
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COMMENTARIES

ON THE

CONSTITUTION OF THE UNITED STATES:

WITH

A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY
OF THE COLONIES AND STATES BEFORE THE
ADOPTION OF THE CONSTITUTION.

By JOSEPH STORY, LL.D.

IN TWO VOLUMES.

VOL. II.

FIFTH EDITION,

By MELVILLE M. BIGELOW, PH.D.

*"Magistratibus igitur opus est; sine quorum prudentiâ ac diligentia esse civitas non potest;
quorumque descriptione omnis Reipublice moderatio continetur."*
CICERO, De Leg., lib. 3, cap. 2.

"Government is a contrivance of human wisdom to provide for human wants."
BURKE.

BOSTON:
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CHAPTER XV.

POWER TO BORROW MONEY AND REGULATE COMMERCE.

§ 1054. HAVING finished this examination of the power of taxation, and of the accompanying restrictions and prohibitions, the other powers of Congress will be now examined in the order in which they stand in the eighth section.

§ 1055. The next is the power of Congress "to borrow money on the credit of the United States." This power seems indispensable to the sovereignty and existence of a national government. Even under the confederation this power was expressly delegated.¹ The remark is unquestionably just, that it is a power inseparably connected with that of raising a revenue, and with the duty of protection, which that power imposes upon the general government. Though in times of profound peace it may not be ordinarily necessary to anticipate the revenues of a state; yet the experience of all nations must convince us, that the burden and expenses of one year, in time of war, may more than equal the ordinary revenue of ten years. Hence, a debt is almost unavoidable, when a nation is plunged into a state of war. The least burdensome mode of contracting a debt is by a loan. Indeed, this recourse becomes the more necessary, because the ordinary duties upon importations are subject to great diminution and fluctuations in times of war; and a resort to direct taxes for the whole supply would, under such circumstances, become oppressive and ruinous to the agricultural interests of the country.² Even in times of peace exigencies may occur, which render a

¹ Article 9.

² 1 Tuck. Black. Comm. App. 245, 246; The Federalist, No. 41.

loan the most facile, economical, and ready means of supply, either to meet expenses, or to avert calamities, or to save the country from an undue depression of its staple productions. The government of the United States has, on several occasions in times of profound peace, obtained large loans, among which a striking illustration of the economy and convenience of such arrangements will be found in the creation of stock on the purchase of Louisiana. The power to borrow money by the United States cannot, as has been already seen, in any way be controlled, or interfered with by the States. The granting of the power is incompatible with any restraining or controlling power; and the declaration of supremacy in the Constitution is a declaration that no such restraining or controlling power shall be exercised.¹ (a)

§ 1056. The next power of Congress is, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

§ 1057. The want of this power, as has been already seen, was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the Constitution.² (b) It is a power vital to the prosperity of the

¹ *Weston v. City Council of Charleston*, 2 Peters's R. 449, 468.

² *Gibbons v. Ogden*, 9 Wheat. R. 1, 225, Johnson, J.'s, opinion; *Brown v. Maryland*, 12 Wheat. R. 445, 446.

(a) See also *Bank of Commerce v. New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Van Allen v. Assessors*, 3 Wall. 573; *People v. Commissioners*, 4 Wall. 244; *Bradley v. People*, Id. 459; *The Banks v. The Mayor*, 7 Wall. 16; *Bank v. Supervisors*, Id. 26.

(b) "This government," said Mr. John Randolph, "grew out of the necessity, indispensable and unavoidable, in the circumstances of this country, of some general power, capable of regulating foreign commerce." "The proximate as well as the remote cause of the existence of the federal government was the regulation of foreign commerce." "If the old Congress had possessed the power of laying a duty of ten per cent *ad valorem* on imports, this Constitution would never have been called into existence." Speech on Internal Improvements, Garland's Life

of Randolph, II. 205. "Maritime defence, commercial regulation, and national revenue were laid at the foundation of the national compact. They are its leading principles, and the cause of its existence. They were primary considerations, not only with the convention which framed the Constitution, but also with the people when they adopted it. They were the objects, and the only important objects, to which the States were confessedly incompetent. To effect these by the means of a national government was the constant, the prevalent, the exhaustless topic of those who favored the adoption of the Constitution." Life of Webster, by Curtis, I. 103. See also Id. II. 601, 602; Webster's Works, II. 174; IV. 492, 494; Life, &c., of Sam. Adams, by Welles, III. 249.

Union; and without it the government would scarcely deserve the name of a national government, and would soon sink into discredit and imbecility.¹ It would stand as a mere shadow of sovereignty, to mock our hopes, and involve us in a common ruin.

§ 1058. The oppressed and degraded state of commerce, previous to the adoption of the Constitution, can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States.²

§ 1059. But this subject has been already so much discussed, and the reasons for conferring the power so fully developed, that it seems unnecessary to dwell further upon its importance and necessity.³ In the convention there does not appear to have been any considerable (if, indeed, there was any) opposition to the grant of the power. It was reported in the first draft of the Constitution exactly as it now stands, except that the words, "and with the Indian tribes," were afterwards added; and it passed without a division.⁴

§ 1060. In considering this clause of the Constitution several important inquiries are presented. In the first place, what is the natural import of the terms; in the next place, how far the power is exclusive of that of the States; in the third place, to what purposes and for what objects the power may be constitu-

¹ The Federalist, Nos. 4, 7, 11, 22, 37.

² *Brown v. State of Maryland*, 12 Wheat. R. 419, 445, 446; 1 Tuck. Black. Comm. App. 248 to 252; 1 Amer. Museum, 8, 272, 273, 281, 282, 288; 2 Amer. Museum, 263 to 276; Id. 371, 372; The Federalist, Nos. 7, 11, 22; Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1823; 5 Marshall's Life of Washington, ch. 2, pp. 74 to 80; 2 Pitkin's Hist. 189, 192.

³ The Federalist, Nos. 7, 11, 12, 22, 41, 42.

⁴ Journal of Convention, 220, 257, 260, 356, 378.

tionally applied; and, in the fourth place, what are the true nature and extent of the power to regulate commerce with the Indian tribes.

§ 1061. In the first place, then, what is the constitutional meaning of the words, "to regulate commerce;" (a) for the

(a) Legislation authorizing the abating of distilleries as nuisances is not within the meaning of this provision. *Kidd v. Pearson*, 128 U. S. 1. Nor is legislation which makes color blindness a disqualification for service on railroads. *Nashville R. Co. v. State*, 128 U. S. 96; *Smith v. Alabama*, 124 U. S. 465. Nor is the exaction of license fees against corporations of another State. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, *Home Ins. Co. v. Augusta*, 93 U. S. 116; *Paul v. Virginia*, 8 Wall. 168. A foreign corporation may be excluded entirely, or its business limited to a particular locality. See, however, for some qualification, *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 12. Further, see *Cooley Const. Lim.* 609, 6th ed.; *Corson v. Maryland*, 120 U. S. 502; *Kimmish v. Ball*, 129 U. S. 217; *Bowman v. Chicago R. Co.*, 125 U. S. 465 (State statute forbidding importation of intoxicating liquors unconstitutional); *Leisy v. Hardin*, 135 U. S. 100 (same); *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Smith v. Alabama*, 124 U. S. 465; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Wabash R. Co. v. Illinois*, 118 U. S. 557; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Moran v. New Orleans*, 112 U. S. 69; *Telegraph Co. v. Texas*, 105 U. S. 460; *Lord v. Goodall*, 102 U. S. 541 (navigation of waters within one State); *Western Union Tel. Co. v. Texas*, 105 U. S. 460 (telegraphs are instruments of commerce); *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 (same); *McCready v. Virginia*, 94 U. S. 391 (land not an instrument of commerce); *Hanni-*

bal R. Co. v. Husen, 95 U. S. 465 (statute prohibiting the driving of cattle into the State, a regulation of commerce); *Hall v. De Cuir*, Id. 485; *McCall v. California*, 136 U. S. 104; *Norfolk R. Co. v. Pennsylvania*, Id. 114 (connecting railroads); *Minnesota v. Barber*, Id. 313 (inspection of animals before slaughter).

It has been held, in a case which excited general public interest, that State laws against the sale of goods imported from a sister State, to be sold by the importer (as he may be called) in the original packages unbroken, are unconstitutional under the commerce clause of the federal Constitution; and that such laws are not to be treated as falling within the police powers reserved to the States. *Leisy v. Hardin*, 135 U. S. 100 (a case of intoxicating liquors), overruling *Peirce v. New Hampshire*, 5 How. 504. Three judges dissented in *Leisy v. Hardin*. See also *Lyng v. Michigan*, 135 U. S. 161, following *Leisy v. Hardin*, with the same dissent. These cases overrule or reverse several decisions of the State courts. *Collins v. Hills*, 77 Iowa, 181; *People v. Lyng*, 42 N. W. Rep. 139. See also *Cooley Const. Lim.* 717, 6th ed.

The question, in view of the strong dissent, can hardly be considered as fully settled, and indeed is now the subject of discussion and controversy in the legal periodicals and in the profession at large. What the result will be is hardly indicated by the course of the discussion, so far as the question turns upon the state of things existing at the time of the litigation in *Leisy v. Hardin*. Since then, federal legislation has met the question raised in that particular case, by providing that the imported liquors shall be subject to the local laws. But this legislation

Constitution being (as has been aptly said) one of enumeration, and not of definition, it becomes necessary, in order to ascertain

itself has in one or two cases been made the subject of certain rather far-fetched views. The decision in *Leisy v. Hardin* was looked upon as entirely annulling the State legislation in question, so as to relieve "importers" in original packages until new legislation should be obtained. See *In re Rahrer*, 43 Fed. Rep. 556, Circ. Court U. S. for Kansas. See also *Tuchman v. Welch*, 42 Fed. Rep. 548; *Schandler Bottling Co. v. Welch*, Id. 561, in the same court. Such a doctrine would have the effect to prevent the court from overruling a decision of its own against the constitutionality of a statute; for when the question arose again, the court could only say that the statute in question does not exist; the prior decision put an end to it.

Legislation alone can *repeal* legislation; the declaration of the courts against the constitutionality of a statute merely makes the statute inoperative for the purposes of that case, and probably so (subject to a change of view of the same court) for cases falling within its principle. The Supreme Court has refused to consider the declaration of unconstitutionality as amounting to a repeal of the legislation. *In re Rahrer*, 140 U. S. 545, reversing 43 Fed. Rep. 556, *supra*. See also *In re Van Vliet*, 43 Fed. Rep. 761.

Recurring to the situation before the court in *Leisy v. Hardin*, one observation may here be ventured, to wit, that it is no effectual answer to the view of the majority to say, as sometimes has been said, that the States would never have ratified the Constitution with such a construction put upon the commerce clause, however probable that may be. For as we have observed in another connection (*post*, § 1789, note,) it is to be taken that the sovereign power, the people, in adopting the Constitution, and thereby giving to the courts the function of interpretation, intended that interpretation should,

within reasonable limits, be influenced by the demands of public policy and the public welfare, according to changes of time and circumstances; and that the courts should not be tied down by the special state of things existing in times of a new and untried experiment in government. On that theory the federal Supreme Court has often acted; so has Congress; and so has the Executive. There is reason for saying that the term "police powers" cannot be held to mean, at the present day, all that it meant a hundred years ago.

If, however, there is a radical opposition between the commerce clause and State laws of police, as there seems to be (since the federal government, which has the final interpretation of the word "commerce," treats intoxicating liquors as a subject of commerce), the question which must prevail admits but one answer. The federal Constitution is "the supreme law of the land." Legislation, or, where that cannot avail, constitutional amendment is the remedy for such cases, and indeed for all cases of conflict between federal and State powers, in which there is serious doubt.

In regard to the subject of *Leisy v. Hardin*, a possible distinction may be noticed between laws which prohibit importation of certain goods and laws which merely regulate their sale (in the original packages) after importation. See *Bowman v. Chicago Ry. Co.*, 125 U. S. 465, 506, Field, J.

This note may be concluded with a short quotation from the judgment in *Lyng v. Michigan*. The court said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts

the extent of the power, to ascertain the meaning of the words.¹ The power is to regulate; that is, to prescribe the rule by which commerce is to be governed.² The subject to be regulated is commerce. Is that limited to traffic, to buying and selling, or the interchange of commodities? Or does it comprehend navigation and intercourse? If the former construction is adopted, then a general term applicable to many objects is restricted to one of its significations. If the latter, then a general term is retained in its general sense. To adopt the former, without some guiding grounds furnished by the context, or the nature of the power, would be improper. The words being general, the sense must be general also, and embrace all subjects comprehended under them, unless there be some obvious mischief or repugnance to other clauses to limit them. In the present case there is nothing to justify such a limitation. Commerce undoubtedly is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation; which shall be silent on the admission of the vessels of one nation into the ports of another; and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or barter.³(a)

§ 1062. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government; it has been exercised with the consent of all America; and it has been always understood to be a commercial regulation. The power over navigation, and over com-

¹ *Gibbons v. Ogden*, 9 Wheat. R. 189.

² 9 Wheat. R. 196.

³ *Gibbons v. Ogden*, 9 Wheat. 189, 190; *Id.* 229, 230.

to a regulation of it, which belongs solely to Congress." This language is quoted by the court, in *McCall v. California*, 136 U. S. 104.

(a) The power to regulate commerce was vested in Congress to secure equality

and freedom against discriminations; it was not intended that the power should be exercised to interfere with making private contracts not designed to interfere with commerce. *Dubuque R. Co. v. Richmond*, 19 Wall. 584.

mercial intercourse, was one of the primary objects for which the people of America adopted their government; and it is impossible that the convention should not so have understood the word "commerce," as embracing it.¹ Indeed, to construe the power so as to impair its efficacy would defeat the very object for which it was introduced into the Constitution;² for there cannot be a doubt, that to exclude navigation and intercourse from its scope would be to entail upon us all the prominent defects of the confederation, and subject the Union to the ill-adjusted systems of rival States, and the oppressive preferences of foreign nations in favor of their own navigation.³

§ 1063. The very exceptions found in the Constitution demonstrate this; for it would be absurd, as well as useless, to except from a granted power that which was not granted, or that which the words did not comprehend. There are plain exceptions in the Constitution from the power over navigation, and plain inhibitions to the exercise of that power in a particular way. Why should these be made, if the power itself was not understood to be granted? The clause already cited, that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, is of this nature. This clause cannot be understood as applicable to those laws only which are passed for purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, relates to navigation. But the remaining part of the sentence directly points to navigation. "Nor shall vessels, bound to or from one State, be obliged to enter, clear, or pay duties in another."⁴ In short, our whole system for the encouragement of navigation in the coasting trade and fisheries is exclusively founded upon this supposition. Yet no one has ever been bold enough to question the constitutionality of the laws creating this system.⁵ (a)

¹ 9 Wheat. R. 190, 191; Id. 215, 216, 217; Id. 229, 230; 1 Tuck. Black. Comm. App. 249 to 252.

² 12 Wheat. R. 446.

³ 1 Tuck. Black. Comm. App. 247, 248, 249.

⁴ 9 Wheat. R. 191.

⁵ 9 Wheat. R. 191, 215, 216; *North River Steamboat Company v. Livingston*, 3 Cowen's R. 713.

(a) The views expressed in the text are fully supported by *Wheeling Bridge Co.*, 13 How. 515; *Gilman v. Philadelphia*, 3 Wall. 713; *Head*

§ 1064. Foreign and domestic intercourse has been universally understood to be within the reach of the power. How, otherwise, could our systems of prohibition and non-intercourse be defended? From what other source has been derived the power of laying embargoes in a time of peace, and without any reference to war or its operations? Yet this power has been universally admitted to be constitutional, even in times of the highest political excitement. And although the laying of an embargo in the form of a perpetual law was contested as unconstitutional, at one period of our political history, it was so not because an embargo was not a *regulation* of commerce, but because a perpetual embargo was an annihilation, and not a regulation of commerce.¹ (a) It may, therefore, be safely affirmed that

¹ 9 Wheat. 191, 192, 193; 1 Kent's Comm. Lect. 19, pp. 404, 405; The *Brigantino William*, 2 Hall's Law Journal, 265; Sergeant on Const. ch. 28, p. 290, &c.; *post*, § 1285 to § 1287.

Money Cases, 112 U. S. 580; and other cases referred to in the note to § 1072, *post*.

(a) See also Bradford's History of Massachusetts, III. 108. Mr. Randolph was also disposed to question the constitutionality of the embargo except as an incipient war measure. See Garland's Life of Randolph, I. 269. Mr. Webster says: "No doubt a great majority of the people of New England conscientiously believed the embargo law of 1807 unconstitutional. . . . They reasoned thus: Congress has power to regulate commerce; but here is a law, they said, stopping all commerce, and stopping it indefinitely. The law is perpetual; that is, it is not limited in point of time, and must of course continue until it shall be repealed by some other law. It is as perpetual, therefore, as the law against treason or murder. Now, is this regulating commerce, or destroying it? Is it guiding, controlling, giving the rule to commerce as a subsisting thing, or is it putting an end to it altogether?" Webster's Works, III. 327. Connected with this subject is an interesting episode in the life of Mr. Samuel Dexter. He was employed in the embargo cases before

Judge Davis. "On those occasions the constitutionality of the embargo law came up, as a matter of course, and Mr. Dexter's arguments upon that question were very elaborate. Judge Davis decided in favor of the constitutionality of the embargo law; and that decision was afterwards confirmed by the highest authority. Mr. Dexter, probably, never argued more entirely in conformity with his solemn convictions than when he contended that this extremely unpopular law was a violation of the Constitution. The decision of this question was of the highest importance. Bonds had been given, under the provisions of this law, to an enormous amount; and the penalties were now claimed by the government.

"After Judge Davis had decided that the law was constitutional, and before that decision had been confirmed by a higher tribunal, Mr. Dexter persisted in arguing the question of constitutionality to the jury, notwithstanding the remonstrances of the bench. At length Judge Davis, under some excitement, and after repeated admonitions, said to Mr. Dexter, that if he again attempted to raise that question to the jury, he should feel it to

the terms of the Constitution have at all times been understood to include a power over navigation, as well as trade; over intercourse, as well as traffic;¹ and that, in the practice of other countries, and especially in our own, there has been no diversity of judgment or opinion. During our whole colonial history, this was acted upon by the British Parliament as an uncontested doctrine. That government regulated not merely our traffic with foreign nations, but our navigation and intercourse, as unquestioned functions of the power to regulate commerce.²

§ 1065. This power the Constitution extends to commerce with foreign nations, and among the several States, and with the Indian tribes. (a) In regard to foreign nations, it is universally admitted that the words comprehend every species of commercial

¹ 9 Wheat. 189, 190, 191, 193, 215, 216, 217; Id. 226; 12 Wheat. R. 446, 447; North River Steamboat Co. v. Livingston, 3 Cowen's R. 713.

² Gibbons v. Ogden, 9 Wheat. R. 1, 201; Id. 224; Id. 225 to 228. See Mr. Verplanck's letter to Col. Drayton in 1831; Resolves of Congress, 14th Oct. 1774 (1 Journal of Congress, 27), 2 Marshall's Life of Washington (in five volumes), pp. 77, 81; Dr. Franklin's Examination, before the House of Commons, in 1766; Dickerson's Farmer's Letters, No. 2, 1767; 1 Jefferson's Corresp. 7; Burke's Speech on American Taxation, 1774.

be his duty to commit him for contempt of court. A solemn pause ensued; all eyes were turned towards Mr. Dexter. With great calmness of voice and manner, he requested a postponement of the cause until the following morning. The judge assented; some other matter was taken up, and Mr. Dexter left the court-room.

"On the following morning there was a full attendance of persons anxious to witness the result of this extraordinary collision between the advocate and the judge. Being asked if he was ready to proceed with the cause on trial the preceding day, Mr. Dexter rose, and, facing the bench, commenced his remarks by stating that he had slept poorly, and had passed a night of great anxiety. He had reflected very solemnly upon the occurrence of yesterday, and he trusted it had not failed to exercise the thoughts of another, in all its bearings. No man cherished a higher respect for the legitimate authority of those tribunals before which he was called to practise his profession; but he entertained

no less respect for his moral obligations to his clients. And finally, after a few additional remarks, he stated to the court that he had arrived at the clear conviction that it was his duty to argue the constitutional question to the jury, notwithstanding the decision of a single judge of an inferior grade; and that he should proceed to do so, regardless of any consequences. He then turned to the jury, and, undisturbed by the court, began, continued, and ended a most elaborate argument against the constitutionality of the embargo law." Reminiscences of Dexter, by "Sigma," No. 9.

When this scene took place, it was not so fully settled as it is now that juries in the federal courts are not the rightful judges of the law, even in criminal cases. See *United States v. Battiste*, 2 Sum. 240; *Stettinius v. United States*, 5 Cranch C. C. 573; *United States v. Morris*, 1 Curt. 23, 53; *United States v. Riley*, 5 Blatch. 206. C.

(a) See *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641.

intercourse. (a) No sort of trade or intercourse can be carried on between this country and another, to which they do not extend. Commerce, as used in the Constitution, is a unit, every part of which is indicated by the term. If this be its admitted meaning in its application to foreign nations, it must carry the same meaning throughout the sentence.¹ The next words are, "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It does not, indeed, comprehend any commerce which is purely internal between man and man in a single State, or between different parts of the same State, and not extending to, or affecting other States. Commerce among the States means commerce which concerns more States than one. It is not an apt phrase to indicate the mere interior traffic of a single State. The completely internal commerce of a State may be properly considered as reserved to the State itself.² (b)

§ 1066. The importance of the power of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with foreign states.³ A very material object of this power is the relief of the States which import and export through other States, from the levy of improper contributions on them by the latter. If each State were at liberty to regulate the trade between State and State, it is easy to foresee that ways would be found out to load the articles of import and export, during their passage through the jurisdiction, with du-

¹ *Gibbons v. Ogden*, 9 Wheat. R. 194.

² *Gibbons v. Ogden*, 9 Wheat. R. 194, 195, 196; *Brown v. Maryland*, 12 Wheat. 446, 447; *Veazie v. Moor*, 14 Howard, S. C. R. 568.

³ See *The Federalist*, Nos. 6, 7, 11, 12, 22, 41, 42; *North River Steamboat Company v. Livingston*, 3 Cowen's R. 713.

(a) See *Chy Lung v. Freeman*, 92 U. S. 275, as to State statutes relating to immigration.

(b) Although that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States, is excluded from federal control (*Veazie v. Moor*, 14 How. 561), yet a river entirely within a State, which by uniting with other waters forms a

continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water, is to be regarded as navigable water of the United States, and is subject to the regulations of Congress. *The Daniel Ball*, 10 Wall. 558. See further, note to § 1072, *post*.

ties, which should fall on the makers of the latter, and the consumers of the former.¹ The experience of the American States during the confederation abundantly establishes that such arrangements could be, and would be made under the stimulating influence of local interests, and the desire of undue gain.² Instead of acting as a nation in regard to foreign powers, the States individually commenced a system of restraint upon each other, whereby the interests of foreign powers were promoted at their expense. When one State imposed high duties on the goods or vessels of a foreign power to countervail the regulations of such powers, the next adjoining States imposed lighter duties to invite those articles into their port, that they might be transferred thence into the other States, securing the duties to themselves. This contracted policy in some of the States was soon counteracted by others. Restraints were immediately laid on such commerce by the suffering States; and thus a state of affairs disorderly and unnatural grew up, the necessary tendency of which was to destroy the Union itself.³ (a) The history of other nations, also, furnishes the same admonition. In Switzerland, where the union is very slight, it has been found necessary to provide that each canton shall be obliged to allow a passage to merchandise through its jurisdiction into other cantons without an augmentation of tolls. In Germany, it is a law of the empire that the princes shall not lay tolls on customs or bridges, rivers or passages, without the consent of the emperor and diet. But these regulations are but imperfectly obeyed; and great public mischiefs have consequently followed.⁴ (b) Indeed, without this power to regulate commerce among the States, the power of regulating foreign commerce would be incomplete and ineffectual.⁵ The very laws of the Union in regard to the latter, whether for revenue, for restriction, for retaliation, or for encouragement of domestic products or pursuits, might be evaded at pleasure, or rendered impotent.⁶ In short, in a practical view, it is impossi-

¹ 12 Wheaton's R. 448, 449; 9 Wheaton, 199 to 204.

² The Federalist, No. 42; 1 Tuck. Black. Comm. App. 247 to 252.

³ See President Monroe's Exposition and Message, 4 May, 1822, pp. 31, 32.

⁴ The Federalist, Nos. 22, 42.

⁵ The Federalist, No. 42.

⁶ The Federalist, Nos. 11, 12.

(a) See History of the Constitution, by Curtis, B. III. chs. 1 and 6; Writings of Madison, I. 320. (b) Of course more recent events have changed all this.

ble to separate the regulation of foreign commerce and domestic commerce among the States from each other. The same public policy applies to each; and not a reason can be assigned for confiding the power over the one, which does not conduce to establish the propriety of conceding the power over the other.¹

§ 1067. The next inquiry is, whether this power to regulate commerce is exclusive of the same power in the States, or is concurrent with it.² (a) It has been settled, upon the most solemn deliberation, that the power is exclusive in the government of the United States.³ (b) The reasoning upon which this doctrine is founded is to the following effect: The power to regulate commerce is general and unlimited in its terms. The full power to regulate a particular subject implies the whole power, and leaves no *residuum*. A grant of the whole is incompatible with the existence of a right in another to any part of it. A grant of a power to regulate necessarily excludes the action of all others who would perform the same operation on the same thing. Regulation is designed to indicate the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to have unbounded as that on which it has operated.⁴

¹ See the opinion of Mr. Justice Johnson, 9 Wheat. R. 224 to 228.

² In the convention it was moved to amend the article, so as to give to Congress "the sole and exclusive" power; but the proposition was rejected by the vote of six States against five. Journal of Convention, 220, 270.

³ *Gibbons v. Ogden*, 9 Wheat. R. 1, 198, 199, 200, 201, 202; *Brown v. Maryland*, 12 Wheat. R. 419, 445, 446; 1 Tuck. Black. Comm. App. 180, 309; *North River Steamboat Co. v. Livingston*, 3 Cowen's R. 713.

⁴ 9 Wheat. R. 196, 198, 209; *Id.* 227, 228.

(a) "The subjects therefore upon which the power [to regulate commerce] may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet when they are national in their character and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive." Mr. Justice Field, in *Gloucester Ferry Co. v. Pennsylvania*, 114

U. S. 196. See *Brown v. Houston*, *ib.* 622; *Welton v. Missouri*, 91 U. S. 282; *Guy v. Baltimore*, 100 U. S. 434; *Moran v. New Orleans*, 112 U. S. 69; *Telegraph Co. v. Texas*, 105 U. S. 460; *Walling v. Michigan*, 116 U. S. 455; *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Tennessee v. Pullman Car Co.*, *ib.* 51.

(b) *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Michigan*, 121 U. S. 230. See note to § 1072.

§ 1068. The power to regulate commerce is not at all like that to lay taxes. The latter may well be concurrent, while the former is exclusive, resulting from the different nature of the two powers. (a) The power of Congress, in laying taxes, is not necessarily or naturally inconsistent with that of the States. Each may lay a tax on the same property, without interfering with the action of the other; for taxation is but taking small portions from the mass of property, which is susceptible of almost infinite division. In imposing taxes for State purposes, a State is not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power which is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.¹(b)

§ 1069. Nor can any power be inferred in the States to regulate commerce, from other clauses in the Constitution or the acknowledged rights exercised by the States. The Constitution has prohibited the States from laying any impost or duty on imports or exports; but this does not admit that the State might otherwise have exercised the power, as a regulation of commerce. The laying of such imposts and duties may be, and indeed often is used, as a mere regulation of commerce, by governments possessing that power.² But the laying of such imposts and duties is as certainly, and more usually, a right exercised as a part of

¹ *Gibbons v. Ogden*, 9 Wheaton's R. 199, 200.

² 9 Wheaton's R. 201, 202; 1 Jefferson's Corresp. 7; *The Federalist*, No. 56; 12 Wheaton's R. 446, 447.

(a) See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. The States, however, must have jurisdiction; as to which see the case just cited. Also see *Morgan v. Parham*, 16 Wall. 471; *Philadelphia R. Co. v. Pennsylvania*, 15 Wall. 232; *Erie Ry. Co. v. Pennsylvania*, *Ib.* 282; *Philadelphia R. Co. v. Pennsylvania*, *Ib.* 284; *Cleveland R. Co. v. Pennsylvania*, *Ib.* 300; *Pittsburgh R. Co. v. Pennsyl-*

vania, *Ib.* 326 n.; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456; *Hays v. Pacific Steamship Co.*, 17 How. 596; *McCulloch v. Maryland*, 4 Wheat. 429.

(b) *Fargo v. Michigan*, 121 U. S. 230. It is often difficult, however, to draw the line. See *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456.

the power to lay taxes, and with this latter power the States are clearly intrusted. So that the prohibition is an exception from the acknowledged power of the States to lay taxes, and not from the questionable power to regulate commerce. Indeed, the Constitution treats these as distinct and independent powers. The same remarks apply to a duty on tonnage.¹

§ 1070. Nor do the acknowledged powers of the States over certain subjects, having a connection with commerce, in any degree impugn this reasoning. These powers are entirely distinct in their nature from that to regulate commerce; and though the same means may be resorted to, for the purpose of carrying each of these powers into effect, this by no just reasoning furnishes any ground to assert that they are identical.² Among these are inspection laws, health laws, laws regulating turnpikes, roads, and ferries, all of which, when exercised by a State, are legitimate, arising from the general powers belonging to it, unless so far as they conflict with the powers delegated to Congress.³ (a) They are not so much regulations of commerce as of police; and may truly be said to belong, if at all to commerce, to that which is purely internal. The pilotage laws of the States may fall under the same description. But they have been adopted by Congress, and, without question, are controllable by it.⁴ (b)

§ 1071. The reasoning by which the power given to Congress to regulate commerce is maintained to be exclusive, has not been of late seriously controverted; and it seems to have the cheerful acquiescence of the learned tribunals of a particular State, one of whose acts brought it first under judicial examination.⁵

¹ 9 Wheaton's R. 201, 202.

² See *Corfield v. Coryell*, 4 Wash. C. C. R. 371, 379, &c.

³ 9 Wheaton's R. 203 to 207, 209; *post*, § 1071; *City of New York v. Miln*, 11 Peters, S. C. R. 103.

⁴ 9 Wheaton's R. 207, 208, 209.

⁵ Kent's Comm. Lect. 19, pp. 404, 410, 411. See also Rawle on the Constitution, ch. 9, pp. 81 to 84; Sergeant on the Const. ch. 28, pp. 291, 292. There is a very able and candid review of the whole subject, by Mr. Chancellor Kent, in his excellent Commentaries. 1 Kent's Comm. Lect. 19, p. 404. I gladly avail myself of this, as well as of all other occasions, to recommend his learned labors to those who seek to study the law, or the Constitution, with a liberal and enlightened spirit.

(a) So of laws prohibiting the owning or keeping of intoxicating liquors with intent to sell the same within the State which prohibits. *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31.

See *Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623; *Foster v. Kansas*, 112 U. S. 205.

(b) *Wilson v. McNamee*, 102 U. S. 572.

§ 1072. The power to Congress, then, being exclusive, no State is at liberty to pass any laws imposing a tax upon importers importing goods from foreign countries, or from other States.^(a) It is wholly immaterial whether the tax be laid on the goods imported or on the person of the importer. In each case it is a restriction of the right of commerce, not conceded to the States. As the power of Congress to regulate commerce reaches the interior of a State,¹ it might be capable of authorizing the sale of the articles which it introduces. Commerce is intercourse; and one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation; and it is an essential ingredient of that intercourse of which importation constitutes a part. As Congress have the right to authorize importation, they must have a right to authorize the importer to sell. What would be the language of a foreign government which should be informed that its merchants, after importation, were forbidden to sell the merchandise imported? What answer could the United States give to the complaints and just reproaches to which such extraordinary conduct would expose them? No apology could be received or offered. Such a state of things would annihilate commerce. It is no answer that the tax may be moderate; for, if the power exists in the States, it may be carried to any extent they may choose. If it does not exist, every exercise of it is,

¹ 9 Wheaton's R. 197 to 204.

(a) See *Almy v. California*, 24 How. 169; *Woodruff v. Parham*, 8 Wall. 123; *State Freight Tax Case*, 15 Wall. 232; *Osborne v. Mobile*, 16 Wall. 479; *Ward v. Maryland*, 12 Wall. 418; *Railroad Co. v. Maryland*, 21 Wall. 456; *Tiernan v. Rinker*, 102 U. S. 123; *Welton v. Missouri*, 91 U. S. 275; *Guy v. Baltimore*, 100 U. S. 434; *Howe Machine Co. v. Gage*, 100 U. S. 676; *Head Money Cases*, 112 U. S. 580; *Gloucester Ferry Co. v. Penn-*

sylvania, 114 U. S. 196; *Walling v. Michigan*, 116 U. S. 455; *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Tennessee v. Pullman Car Co.*, 117 U. S. 51. A person dealing in a number of articles of the same nature, some of which are made the object of unconstitutional discrimination, while the others are not, cannot raise the constitutional objection to taxation as to the latter. *Tiernan v. Rinker*, *supra*.

pro tanto, a violation of the power of Congress to regulate commerce.¹ (a)

¹ *Brown v. State of Maryland*, 12 Wheaton's R. 419, 445 to 447; 9 Wheaton's R. 197, &c. Mr. Justice Thompson dissented from this doctrine, as will be seen in his opinion in 12 Wheaton's R. 449, &c.

(a) Whether the power conferred upon Congress over commerce is exclusive, or whether, on the other hand, the States may establish regulations not inconsistent with those prescribed by Congress, is a question in respect to which a diversity of opinion among the justices of the Supreme Court has manifested itself in several important cases.

It has never been doubted that to the extent to which regulations have been established by Congress its authority is supreme, and all State laws or regulations that would conflict with them must give way. See *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Michigan*, 121 U. S. 230; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492; *Corson v. Maryland*, *ib.* 502; *Ouchita Packet Co. v. Aiken*, 121 U. S. 444; *Newport Bridge Co. v. United States*, 105 U. S. 470; *Wisconsin v. Duluth*, 96 U. S. 379. The case of *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 515, may be referred to as one of the cases presenting this view. The State of Pennsylvania filed its bill on the equity side of the federal court to have the Wheeling Bridge declared a public nuisance, and abated as such. The bridge was built under the authority of the State of Virginia, across the Ohio River, at a point within the jurisdiction of that State. The Ohio River was navigable at that point, and for many years the commerce upon it had been regulated by Congress, under the commercial power, by establishing ports, requiring vessels which navigated it to take out licenses, and to observe certain rules for the safety of their passengers and cargoes.

Appropriations by Congress had been frequently made to remove obstructions to navigation from its channel. The bridge was an impediment to commerce

as carried on upon some of the vessels navigating it; but how serious, was a question in dispute. Congress had never declared it an obstruction, or taken any hostile action whatever in regard to it. The State of Pennsylvania, as proprietor of public works upon which commerce was carried on in connection with the river Ohio, was specially damaged from day to day by the existence of the bridge. The majority of the court, delivering its opinion through Mr. Justice McLean, held the law of Virginia which authorized the construction of the bridge void, because in conflict with the laws of Congress regulating the commerce among different States and with foreign nations carried on upon this river. Taney, C. J., and Daniels, J., dissented, taking the ground, among others, that the erection of the bridge was in conflict with no regulation established by Congress. The view of the majority was more pointedly stated when the case again came before the court, "that Congress had acted upon the subject, and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them, and that, to the extent of this interference with this free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law." 18 How. 430.

And it was declared on the occasion last referred to that the power of Congress to regulate commerce included the power to determine what should or should not

§ 1073. How far any State possesses the power to authorize an obstruction of any navigable stream or creek, in which the tide

be deemed, in judgment of law, an obstruction to navigation; and Congress having since the first decision declared the Wheeling Bridge a lawful structure, it must be regarded as such.

In *Gilman v. Philadelphia*, 3 Wall. 713, a riparian proprietor sought to enjoin the erection of a bridge about to be built, which it was claimed would constitute an obstruction to navigation. The river was tidal and navigable, but was wholly within the limits of the State of Pennsylvania; and it was under the authority of that State that the bridge was to be erected. The court denied the relief prayed. "Commerce," it was said, "includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States, which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. *Gibbons v. Ogden*, 9 Wheat. 1; *Corfield v. Coryell*, 4 Wash. C. C. 378;" *Escanaba Co. v. Chicago*, 107 U. S. 678; *The Daniel Ball*, 10 Wall. 557; *Wisconsin v. Duluth*, 96 U. S. 379; *South Carolina v. Georgia*, 93 U. S. 4 (that State compacts cannot interfere with the right of Congress). "This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into

activity, and as to the regulations and sanctions which shall be provided. *Escanaba Co. v. Chicago*, *supra*; *United States v. New Bedford Bridge*, 1 Wood. & Minot, 420, 421; *United States v. Coombs*, 12 Pet. 72; *New York v. Miln*, 11 Pet. 102, 155. A license, under the act of 1793, to engage in the coasting trade, carries with it right and authority. Commerce among the States does not stop at a State line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever commerce among the States goes, the power of the nation, as represented in this court, goes with it to protect its rights. *Gibbons v. Ogden*, 9 Wheat. 1; *Steamboat Co. v. Livingston*, 3 Cow. 713. There can be no doubt that the coasting trade may be carried on where the bridge in question is to be built.

"We will now turn our attention to the rights and powers of the States, which are to be considered. The national government possesses no powers but such as have been delegated to it. The States have all but such as they have not surrendered. The power to authorize the building of bridges is not to be found in the federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. . . . The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States. Whether the power in any given case is

ebbs and flows, within its territorial limits, as by authorizing the erection of a dam across it, has been a subject of much recent

vested exclusively in the general government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a State enact them in good faith, and not covertly for another purpose, they are not in conflict with the power to regulate commerce committed to Congress by the Constitution. *Cooley v. The Board of Wardens*, 12 How. 319."

The court proceed to say that the most important case in its application to the one then under judgment was that of *Wilson v. The Blackbird Creek Marsh Co.*, 2 Pet. 245. In that case was drawn in question the validity of a State law, which, for the purpose of improving its marsh lands and promoting the public health, permitted the construction of a dam across a creek previously navigable from the sea by vessels enrolled and licensed for the coasting trade. There was no act of Congress forbidding its erection or declaring it an obstruction to commerce, — a fact deemed of the highest importance by Chief Justice Taney in the *Wheeling Bridge Case*, — nor was there any legislation of Congress which could be regarded as in conflict with the State law, unless the general regulations for the coasting trade, and the enrolling and licensing of vessels therefor could be so treated. The court sustained the law, Marshall, C. J., saying: "If Congress had passed any act which bore upon the case, — any act in execution of the power to regulate commerce, the object of which was to control legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, — we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its re-

pugnancy to the power to regulate commerce with foreign nations and among the several States, — a power which has not been so exercised as to affect the question."

The difference between the facts in the *Wheeling Bridge Case*, and those in the one last referred to, in which a conclusion so different was reached, is not so obvious at first as to preclude possible misapprehension. In neither case was the particular structure in question forbidden by congressional legislation, and in each, privileges derived by vessels engaged in navigation under the laws of Congress were, or might be, prevented from being exercised. But in the case of the *Ohio River*, these laws, and the regulations established under them, had recognized it as a highway of commerce, while in the case of *Blackbird Creek* there was no such explicit recognition, and all that could be said of it was that it was *capable* from its navigable character of being such a highway. In the one case the indirect conflict was palpable and important, in the other it was argumentative rather than actual.

In the *Wheeling Bridge Case*, however, it will be perceived that it was not regarded as a matter of course that the State bridge across a navigable stream covered by the regulations of commerce should be destroyed as unlawful. The bridge itself was to be a highway for travel and traffic; and although it might in some degree constitute an impediment to commerce, its advantages to the general business of the country might be so great as to more than overbalance the inconvenience. Considerations of this character are of very great importance when a power is being exercised which is conferred for the regulation and protection of commerce, and the court very properly went into them in that case, and would have denied the relief prayed had they been satisfied that the inter-

discussion. If Congress, in regulating commerce, should pass any act, the object of which should be to control State legislation

ference was immaterial. They did deny such relief in *Gilman v. Philadelphia*. See also the important case of *Jolly v. The Terre Haute Drawbridge Co.*, 6 McLean, 237; *Columbus Ins. Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Same v. Curtinius*, Id. 209, *United States v. Railroad Bridge*, Id. 518; *Avery v. Fox*, 1 Abb. U. S. Rep. 246, *Woodman v. Kilbourn Manuf. Co.*, Id. 158; *Works v. Junction R. R. Co.*, 5 McLean, 425; *Halderman v. Beckwith*, 4 McLean, 286; *Silliman v. Bridge Co.*, 4 Blatchf. 74, 395.

The case of *New York v. Miln*, 11 Pet. 102, referred to above, involved the validity of an act of the State of New York which required the master of any vessel arriving at the port of New York from a foreign port or from one of the other States, within twenty-four hours after its arrival, to report to the mayor in writing and on oath or affirmation, the name, place of birth, last legal settlement, age, and occupation of every passenger brought in such ship to the city, or permitted to land at any place, or put on board any ship with an intention of proceeding to the city, under a penalty of seventy-five dollars, to be paid by the master, owner, or consignee for every such passenger. The master was also required to give bond to the mayor to save harmless the city authorities from all expenses and charges which might be incurred in the maintenance and support of any passenger not a citizen of the United States, and was compellable, on the order of the mayor, under a heavy penalty, to remove to the place of his last settlement any passenger, being a citizen of the United States, who should be likely to become chargeable on the city. The majority of the court (Mr. Justice Story dissenting, held that this act was to be regarded not as a regulation of commerce, but one of police merely, and consequently as referable to an undoubted power reserved to the States.

On the other hand, in the *Passenger* cases, 7 How. 283, certain acts of the States of New York and Massachusetts having in view a similar purpose to the act last referred to were declared void. The New York act imposed upon the master of every vessel arriving from a foreign port a tax of one dollar and fifty cents for himself and each cabin passenger and one dollar for each steerage passenger, mate, or sailor, and on the master of every coasting vessel twenty-five cents for each person on board, which sums, when collected, after defraying the expenses of enforcing the law, were to be paid over to the Society for Reformation of Juvenile Delinquents in the city of New York. The Massachusetts act authorized certain State officers to go on board of every vessel arriving from a port out of the State, and examine into the condition of the passengers; and to forbid any alien pauper or person incompetent in their opinion to maintain himself, to land, until the master, owner, or consignee of the vessel should give security that such person should not become a city, town, or State charge for ten years; and a heavy penalty was imposed on the master, owner, or consignee of the vessel for every person permitted to land contrary to the prohibition, the money collected to be paid into the city or town treasury for the support of alien paupers. The majority of the court (Justices McLean, Wayne, Catron, Grier, and McKinley; Ch. Justice Taney and Justices Daniel, Nelson, and Woodbury dissenting) held these acts void. Mr. Justice Wayne sums up the conclusions of the majority as follows:—

“1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those States, either in foreign vessels, or vessels of the United States, from foreign nations or from ports

over such navigable streams or creeks, there would be little difficulty in saying that a State law in conflict with such an act

in the United States, are unconstitutional or void, being, in their nature, regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several States.

"2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons as well as the importation of merchandise.

"3. That the acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries 'freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries respectively;' and that said laws are therefore unconstitutional and void.

"4. That, the Congress of the United States having by sundry acts passed at different times admitted foreigners into the United States with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is *in transitu* to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachu-

setts or New York, and before the passengers have been landed, are in violation of said acts of Congress, and therefore unconstitutional and void.

"5. That the acts of Massachusetts and New York, so far as they impose any obligations upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States, or coming from a port in the United States, are unconstitutional and void, being contrary to the constitutional grant to Congress of the power to regulate commerce with foreign nations and among the several States, and to the legislation of Congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes, and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the Constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subject of importation and commerce.

"6. That the fifth clause of the ninth section of the first article of the Constitution, which declares that 'no preference shall be given by any regulation of commerce or revenue to the ports of one

would be void. (a) But if Congress have passed no general or special act on the subject, the invalidity of such a State act

State over those of another State, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another,' is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State.

"7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the Constitution, which enjoins that all duties, imposts and excises shall be uniform throughout the United States, because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the States, in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress, and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

"8. That the power in Congress to regulate commerce with foreign nations, and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

"9. That the States of this Union may, in the exercise of their police pow-

ers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods; prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce, prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the States may, in the exercise of such police power, without any violation of the power in Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention, and of the purification of the vessel, cargo, and apparel of the persons on board."

In *Sinnot v. Davenport*, 22 How. 227, an act of the State of Alabama, which required the owners of steamboats navigating the waters of the State, before a boat should leave the port of Mobile, to file in the office of the probate judge of Mobile County, a statement in writing, setting forth the name of the vessel, and the names, places of residence, and respective interests of the owners, was declared void, so far as it was brought to bear upon a vessel which had taken out a license and been duly enrolled under the acts of Congress. The State act was defended as a regulation for police purposes, but the court were unanimously of opinion that it imposed a condition to the privilege conferred by the license under the federal law, and consequently the conflict

(a) See *Wisconsin v. Duluth*, 96 U. S. 379; *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McLean, 237.

must be placed entirely upon its repugnancy to the power to regulate commerce in its dormant state. Under such circumstances,

with that law was direct and important. See also *Foster v. Davenport*, 22 How. 244.

That regulations of police are within the reserved powers of the States, is fully conceded by several of the cases referred to, and was decided after full consideration in the License Cases, 5 How. 504. See § 1791, n.; *Soon Hing v. Crowley*, 113 U. S. 703; *Stone v. Mississippi*, 101 U. S. 814 (lotteries); *Slaughter House Cases*, 16 Wall. 36; *Chicago Railroad Co. v. Fuller*, 17 Wall. 560 (requiring railroads to put up printed copies of rates). These cases involved the power of the States to prohibit the sale of spirituous liquors without a license from the State, and the question whether, if they possessed such power, it could be made applicable to liquors lawfully imported under the laws of Congress, or brought for sale from one State into another. The court held State laws for this purpose to be mere police regulations, and valid as such even in their application to imported liquors after they should have passed from the hands of the importer and become a part of the general merchandise of the country. In the License Tax Cases, 5 Wall. 462, it was decided that Congress might require the payment of a license fee by way of taxation by those engaging in the sale of liquors, notwithstanding such business was forbidden by State police law, and the payment of the license fee gave no right to carry on the business in opposition to the State law. And in *Pervear v. Commonwealth*, 5 Wall. 475, these views were repeated, and it was further held that the license under the federal law was no bar to an indictment under the State law.

In *United States v. Dewitt*, 9 Wall. 41, a section of the internal revenue act of 1867, — which undertook to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum, inflammable at a less tempera-

ture than 110° Fahrenheit; — was held to be a mere police regulation, and as such void within the States, whose power to make such laws was exclusive. On this subject, see further, *State v. Fosdick*, 21 La. Ann. 256. That Congress has no control of the strictly internal commerce of a State, even though carried on upon navigable waters, see *The Bright Star*, 1 Wool. 366.

That ferries across a river within the limits of one State are not within the power of Congress over commerce, and consequently the acts requiring boats engaged in the coasting trade to be registered and licensed do not apply thereto, see *The James Morrison*, 1 Newb. Adm. 241, 257; *United States v. The William Pope*, Id. 256. That the States may require the payment of a license fee by the owners of such ferry-boats, see *Conway v. Taylor*, 1 Black, 603. That a State may control the fisheries within its limits and confine the privileges thereof to its own citizens, see *Corfield v. Coryell*, 4 Wash. C. C. 371; *Smith v. Maryland*, 18 How. 71. That a State may establish harbor regulations, see *The James Gray v. The John Fraser*, 21 How. 184. That Congress under its power over commerce may provide for the punishment of sales of intoxicating drinks to the Indians, see *United States v. Holliday*, 3 Wall. 407. That the United States may maintain an injunction bill to protect improvements which are being made in navigable waters under the authority of Congress, from injury which might be caused by other improvements under State authority, see *United States v. Duluth*, 1 Dillon, 469.

A tax upon a bill of lading of goods transported upon the high seas is a regulation of commerce, and therefore void. *Almy v. California*, 24 How. 169. See *Woodruff v. Parham*, 8 Wall. 138. A tax on railroad and stage companies for every passenger carried out of the State by

it would be difficult to affirm, that the sovereignty of a State, acting on subjects within the reach of other powers, besides that of regulating commerce, and which belonged to its general territorial jurisdiction, would be intercepted by the exclusive power of commerce, unexercised by Congress, over the same subject-matter. The value of the property on the banks of such streams and creeks may be materially enhanced by excluding the waters from them and the adjacent low and marshy grounds, and the health of the inhabitants be improved. Measures calculated to produce these objects, provided they do not come into collision with the power of the general government, are undoubtedly within those which are reserved to the States.¹ (a)

§ 1074. In the next place, to what extent, and for what objects and purposes the power to regulate commerce may be constitutionally applied.

§ 1075. And, first, among the States. It is not doubted that it extends to the regulation of navigation, and to the coasting

¹ Willson v. Blackbird Creek Company, 2 Peters's R. 245.

them, is not void as a regulation of commerce in the absence of any conflicting regulation by Congress. But it is void as opposed to the free right of the government to transport troops through all parts of the Union, by the usual and most expeditious modes of transportation, and to the right of citizens to approach the great departments of the government, the ports of entry through which commerce is conducted, and the various federal offices in the States. *Crandall v. Nevada*, 6 Wall. 35. The legislation of Congress on the subject of the transfer of mortgages of vessels enrolled and licensed supersedes the legislation of the States on the subject. *White's Bank v. Smith*, 7 Wall. 646. The power of the federal government to make improvements in navigable waters, when called into exercise, is not only paramount but exclusive. *United States v. Duluth*, 1 Dillon, 469.

A review of the cases will show, that of late the Supreme Court has recognized a clear distinction between those cases in which State regulations are admissible, and those in which they are not. What-

ever subjects of the power over commerce are in their character national, or admit of one uniform system or plan of regulation, are to be regarded as within the exclusive control of Congress; but other subjects, which are to be regulated in view of local circumstances and facts, and which can usually be best regulated by State legislation, are, until Congress acts in the matter, subject to such legislation. In this last category belong the regulation of pilots, the construction of bridges over navigable waters, and the like. See *Crandall v. Nevada*, 6 Wall. 42; *Steamship Co. v. Portwardens*, Id. 31; *Ex parte McNiel*, 13 Wall. 236; *Sherlock v. Alling*, 93 U. S. 99. C.

(a) See *Cardwell v. American River Bridge Co.*, 113 U. S. 205; *Miller v. New York*, 109 U. S. 385; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Mobile v. Kimball*, 102 U. S. 691; *Welton v. Missouri*, 91 U. S. 275; *Henderson v. New York*, 92 U. S. 259; *Pound v. Turck*, 95 U. S. 459; *Gilman v. Philadelphia*, 3 Wall. 713.

trade and fisheries, within, as well as without any State, wherever it is connected with the commerce or intercourse with any other State, or with foreign nations.¹ (a) It extends to the regu-

¹ *Gibbons v. Ogden*, 9 Wheat. R. 189 to 198; *Id.* 211 to 215; 1 Tuck. Black. Comm. App. 247 to 249; *Id.* 250.

(a) See also *The Chusan*, 2 Story C. C. 456; *The Wilson*, 1 Brock. 423; *United States v. Coombs*, 12 Pet. 72; and cases cited in note to § 1072, *ante*. And acts done on land which interfere with, obstruct, or prevent commerce or navigation, may be made punishable by act of Congress under its general authority to make all laws necessary and proper to execute its delegated powers. *United States v. Coombs*, *supra*.

The case of *Gibbons v. Ogden* should be considered in connection with the more recent case of *Veazie v. Moor*, 14 How. 568. In the former the laws of New York, which assumed to grant to certain parties the exclusive right to navigate all the waters within the jurisdiction of that State, with boats propelled by steam, for a term of years, were declared inoperative as against the laws of the United States regulating the coasting trade, and consequently could not restrain vessels licensed to carry on the coasting trade under the laws of the United States from navigating those waters in the prosecution of that trade. In the latter case a similar exclusive right to navigate the upper waters of a river lying wholly within the limits of the State granting it, separated from tidal waters by falls impassable for purposes of navigation, and not forming a part of any continuous track of commerce between two or more States, or with a foreign country, was held not repugnant to the Constitution or any law of the United States. Mr. Justice Daniel, delivering the opinion of the court, says:—

“Taking the term ‘commerce’ in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted,

can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with those nations; transactions which either immediately, or at some stage of their progress, must be extra-territorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase ‘foreign commerce,’ or fairly implied in any investiture of the power to regulate such commerce. A pretension as far-reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne, either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned. Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several States; for it cannot be

lation and government of seamen on board of American ships; and to conferring privileges upon ships built and owned in the United States in domestic as well as foreign trade.¹(a) It

¹ 1 Tuck. Black. Comm. App. 252.

supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of those facilities, was unquestionably internal, although immediately or ultimately it might become foreign.

"The rule here given with respect to the regulation of foreign commerce equally excludes from the regulation of commerce between the States and the Indian tribes the control over turnpikes, canals, or railroads, or the clearing and deepening of watercourses exclusively within the States, or the management of the transportation upon and by means of such improvements. In truth, the power vested in Congress by art. 1, sect. 8 of the Constitution, was not designed to operate upon matters like those embraced in the statute of the State of Maine, and which are essentially local in their nature and extent. The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions which local jealousies or local and partial interests might be disposed to introduce and maintain. These were the views pressed upon the public attention by the advocates for the adoption of the Constitution, and in accordance therewith have been the expositions of this instrument propounded by this court, in decisions quoted by counsel on either side of this cause, though differently applied by them. *Vide* The Federalist, Nos. 7 and 11, and the cases of *Gibbons v. Ogden*, 9 Wheat. 1; *New York v. Miln*, 11 Pet. 102;

Brown v. The State of Maryland, 12 Wheat. 419; and *The License Cases* in 5 How. 504."

And alluding to the fact that the party contesting the validity of the State law had procured a coasting license under the laws of Congress, he adds:—

"The fact of procuring from the collector of the port of Bangor a license to prosecute the coasting trade for the boat placed upon the Penobscot by the plaintiff in error (*The Governor Dana*), does not affect, in the slightest degree, the rights or condition of the parties. These remain precisely as they would have stood had no such license been obtained. A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use free of tolls, or of any condition whatsoever, the canals constructed by a State, or the watercourses partaking of the character of canals exclusively within the interior of a State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it."

Supporting this case, see *Withers v. Buckley*, 20 How. 84.

That the States may improve their navigable waters and charge tolls upon the use of the improvement, see further, *Spooner v. McConnell*, 1 McLean, 337; *Palmer v. Commissioners of Cuyahoga County*, 3 McLean, 227; *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500.

(a) See other cases referred to in note

extends to quarantine laws and pilotage laws, and wrecks of the sea.¹ (a) It extends as well to the navigation of vessels engaged in carrying passengers, and whether steam vessels or of any other description, as to the navigation of vessels engaged in traffic and general coasting business.² It extends to the laying of embargoes, as well on domestic as on foreign voyages.³ It extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds, and bays, and the establishment of securities to navigation against the inroads of the ocean. (b) It extends also to the designation of particular port or ports of entry and delivery for the purposes of foreign commerce.⁴ These powers have been actually exerted by the national government under a system of laws, many of which commenced with the early establishment of the Constitution; and they have continued unquestioned unto our day, if not to the utmost range of their reach, at least to that of their ordinary application.⁵

§ 1076. Many of the like powers have been applied in the regulation of foreign commerce. The commercial system of the United States has also been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes;⁶ sometimes to encourage domestic navigation, and the shipping and mercantile interest, by boun-

¹ 9 Wheat. R. 203, 204, 205, 206, 207, 208; 1 Tuck. Black. Comm. App. 251, 252.

² 9 Wheat. R. 214, 215 to 221.

³ 9 Wheat. R. 191, 192; 1 Kent's Comm. Lect. 19, pp. 404, 405.

⁴ 1 Tuck. Black. Comm. App. 249, 251; 9 Wheat. R. 208, 209.

⁵ Mr. Hamilton, in his celebrated argument on the national bank (23 Feb. 1791), enumerates the following as within the power to regulate commerce, viz., the regulation of policies of insurance, of salvage upon goods found at sea, and the disposition of such goods; the regulation of pilots; and the regulation of bills of exchange drawn by one merchant upon a merchant of another State; and, of course, the regulation of foreign bills of exchange. 1 Hamilton's Works, 134.

⁶ Sergeant on Const. Law, ch. 28 (ch. 30, 2d edit.).

to § 1072, *supra*. The power does not extend to the navigation of a river which is wholly within a State, and is separated from tide water by an impassable fall, and which consequently forms no part of any continuous track of commerce between States or with a foreign country. *Veazie v. Moor*, 14 How.

568. Compare with *The Daniel Ball*, 10 Wall. 557.

(a) But upon these subjects the power is not exclusive. See *Cooley v. Board of Wardens*, 12 How. 319; *The James Gray v. The John Fraser*, 21 How. 184.

(b) *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421.

ties, by discriminating duties, and by special preferences and privileges;¹ and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the national government by the unequivocal voice of the people.

§ 1077. A question has been recently made, whether Congress have a constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures. It is not denied that Congress may, incidentally, in its arrangements for revenue, or to countervail foreign restrictions, encourage the growth of domestic manufactures. But it is earnestly and strenuously insisted that, under the color of regulating commerce, Congress have no right permanently to prohibit any importations, or to tax any unreasonably for the purpose of securing the home market to the domestic manufacturer, as they thereby destroy the commerce entrusted to them to regulate, and foster an interest with which they have no constitutional power to interfere.² This opinion constitutes the leading doctrine of several States in the Union at the present moment, and is maintained as vital to the existence of the Union. On the other hand, it is as earnestly and strenuously maintained that Congress does possess the constitutional power to encourage and protect manufactures by appropriate regulations of commerce; and that the opposite opinion is destructive of all the purposes of the Union, and would annihilate its value.

§ 1078. Under such circumstances, it becomes indispensable to review the grounds upon which the doctrine of each party is maintained, and to sift them to the bottom; since it cannot be disguised, that the controversy still agitates all America, and marks the divisions of party by the strongest lines, both geographical and political, which have ever been seen since the establishment of the national government.

§ 1079. The reasoning by which the doctrine is maintained, that the power to regulate commerce cannot be constitutionally applied, as a means directly to encourage domestic manufactures, has been in part already adverted to in considering the extent of the power to lay taxes. It is proper, however, to present

¹ See 1 Elliot's Debates, 144.

² See Address of the Philadelphia Free Trade Convention, in Sept. and Oct. 1831.

it entire in its present connection. It is to the following effect: The Constitution is one of limited and enumerated powers; and none of them can be rightfully exercised beyond the scope of the objects specified in those powers. It is not disputed that when the power is given, all the appropriate means to carry it into effect are included. Neither is it disputed that the laying of duties is, or may be an appropriate means of regulating commerce. But the question is a very different one, whether, under pretence of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power exclusively for the regulation of commerce is a power for the regulation of manufactures? The statement of such a question would seem to involve its own answer. Can a power granted for one purpose be transferred to another? If it can, where is the limitation in the Constitution? Are not commerce and manufactures as distinct as commerce and agriculture? If they are, how can a power to regulate one arise from a power to regulate the other? It is true that commerce and manufactures are, or may be, intimately connected with each other. A regulation of one may injuriously or beneficially affect the other. But that is not the point in controversy. It is, whether Congress has a right to regulate that which is not committed to it, under a power which is committed to it, simply because there is or may be an intimate connection between the powers. If this were admitted, the enumeration of the powers of Congress would be wholly unnecessary and nugatory. Agriculture, colonies, capital, machinery, the wages of labor, the profits of stock, the rents of land, the punctual performance of contracts, and the diffusion of knowledge, would all be within the scope of the power; for all of them bear an intimate relation to commerce. The result would be, that the powers of Congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the State and national governments. When duties are laid, not for purposes of revenue, but of retaliation and restriction, to countervail foreign restrictions, they are strictly within the scope of the power, as a regulation of commerce.¹ But when laid to encourage manufactures, they have nothing to do with it. The power to regulate manufact-

¹ *Ante*, § 1069, *post*, § 1087.

ures is no more confided to Congress than the power to interfere with the systems of education, the poor laws, or the road laws of the States. It is notorious that, in the convention, an attempt was made to introduce into the Constitution a power to encourage manufactures; but it was withheld.¹ Instead of granting the power to Congress, permission was given to the States to impose duties, with the consent of that body, to encourage their own manufactures; and thus, in the true spirit of justice, imposing the burden on those who were to be benefited. It is true that Congress may, incidentally, when laying duties for revenue, consult the other interests of the country. They may so arrange the details as indirectly to aid manufactures. And this is the whole extent to which Congress has ever gone until the tariffs which have given rise to the present controversy. The former precedents of Congress are not, even if admitted to be authoritative, applicable to the question now presented.²

§ 1080. The reasoning of those who maintain the doctrine that Congress has authority to apply the power to regulate commerce to the purpose of protecting and encouraging domestic manufactures, is to the following effect: The power to regulate commerce being in its terms unlimited, includes all means appropriate to the end, and all means which have been usually exerted under the power. No one can doubt or deny that a power to regulate trade involves a power to tax it.³ It is a familiar mode, recognized in the practice of all nations, and was known and admitted by the United States while they were colonies, and has ever since been acted upon without opposition or question. The American colonies wholly denied the authority of the British Parliament to tax them, except as a regulation of commerce; but they admitted this exercise of power as legitimate and un-

¹ A proposition was referred to the committee of details and revision, "to establish public institutions, rewards, and immunities, for the promotion of agriculture, commerce, trade, and manufactures." The committee never reported on it. *Journal of Convention*, p. 261.

² The above arguments and reasoning have been gathered, as far as could be, from documents admitted to be of high authority by those who maintain the restrictive doctrine. See the exposition and protest of the South Carolina legislature, in Dec. 1828, attributed to Mr. Vice-President Calhoun; the Address of the Free Trade Convention at Philadelphia, in Oct. 1831, attributed to Mr. Attorney-General Berrien; the Oration of the Hon. Mr. Drayton on the 4th of July, 1831; and the Speech of Mr. Senator Hayne, 9th of Jan. 1832. See also 4 Jefferson's *Corresp.* 421.

³ *Ante*, § 1073.

questionable. The distinction was with difficulty maintained in practice between laws for the regulation of commerce by way of taxation and laws which were made for mere monopoly or restriction, when they incidentally produced revenue.¹ And it is certain that the main and admitted object of parliamentary regulations of trade with the colonies was the encouragement of manufactures in Great Britain. Other nations have, in like manner, for like purposes, exercised the like power. So that there is no novelty in the use of the power, and no stretch in the range of the power.

§ 1081. Indeed the advocates of the opposite doctrine admit that the power may be applied so as incidentally to give protection to manufactures, when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of foreign powers, when there is no design of revenue. These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered *per se*. If this be true, then other objects may enter into commercial regulations; and, if so, what restraint is there as to the nature or extent of the objects to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted that a power given for one purpose cannot be perverted to purposes wholly opposite, or beside its legitimate scope. But what perversion is there in applying a power to the very purposes to which it has been usually applied? Under such circumstances, does not the grant of the power, without restriction, concede that it may be legitimately applied to such purposes? If a different intent had existed, would not that intent be manifested by some corresponding limitation?

§ 1082. Now it is well known that, in commercial and manufacturing nations the power to regulate commerce has embraced practically the encouragement of manufactures. It is believed that not a single exception can be named. So, in an especial manner, the power has always been understood in Great Britain, from which we derive our parentage, our laws, our language,

¹ See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; Mr. Verplanck's Letter to Col. Drayton, in 1831; Address of the New York Convention in favor of Domestic Industry, November, 1831, pp. 12, 13, 14; 9 Wheat. R. 202; 1 Pitk. Hist. ch. 3, pp. 93 to 106.

and our notions upon commercial subjects. Such was confessedly the notion of the different States in the Union under the confederation, and before the formation of the present Constitution. One known object of the policy of the manufacturing States then was, the protection and encouragement of their manufactures by regulations of commerce.¹ And the exercise of this power was a source of constant difficulty and discontent; not because improper of itself, but because it bore injuriously upon the commercial arrangements of other States. The want of uniformity in the regulations of commerce was a source of perpetual strife and dissatisfaction, of inequalities and rivalries, and retaliations among the States. When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the States, and yet not delegated to the Union. The very suggestion would of itself have been fatal to the adoption of the Constitution. The manufacturing States would never have acceded to it upon any such terms; and they never could, without the power, have safely acceded to it, for it would have sealed their ruin. The same reasoning would apply to the agricultural States; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange, indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures, which had, at the time of the adoption of the Constitution, an unequivocal preponderance throughout the Union. It is manifest, from contemporaneous documents, that one object of the Constitution was to encourage manufactures and agriculture by this very use of the power.²

§ 1083. The terms, then, of the Constitution are sufficiently large to embrace the power; the practice of other nations, and especially of Great Britain and of the American States, has been

¹ 1 American Museum, 16.

² 1 Elliot's Debates, 74, 75, 76, 77, 115; 3 Elliot's Debates, 31, 32, 33; 2 Amer. Museum, 371, 372, 373; 3 Amer. Museum, 62, 554, 556, 557; The Federalist, Nos. 12, 41; 1 Tuck. Black. Comm. App. 237, 238; 1 American Museum, 16, 282, 289, 429, 432; Id. 434, 436; Hamilton's Report on Manufactures, in 1791; 4 Elliot's Debates, App. 351 to 354.

to use it in this manner; and this exercise of it was one of the very grounds upon which the establishment of the Constitution was urged and vindicated. The argument, then, in its favor would seem to be absolutely irresistible under this aspect. But there are other very weighty considerations which enforce it.

§ 1084. In the first place, if Congress does not possess the power to encourage domestic manufactures by regulations of commerce, the power is annihilated for the whole nation. The States are deprived of it; they have made a voluntary surrender of it; and yet it exists not in the national government. It is, then, a mere nonentity. Such a policy, voluntarily adopted by a free people, in subversion of some of their dearest rights and interests, would be most extraordinary in itself, without any assignable motive or reason for so great a sacrifice, and utterly without example in the history of the world. No man can doubt that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce. No man can doubt that it is the most usual, and generally the most efficient means of producing those results. No man can question that, in these great objects, the different States of America have as deep a stake and as vital interests as any other nation. Why, then, should the power be surrendered and annihilated? It would produce the most serious mischiefs at home, and would secure the most complete triumph over us by foreign nations. It would introduce and perpetuate national debility, if not national ruin. A foreign nation might, as a conqueror, impose upon us this restraint as a badge of dependence and a sacrifice of sovereignty, to subserve its own interests; but that we should impose it upon ourselves, is inconceivable. The achievement of our independence was almost worthless, if such a system was to be pursued. It would be in effect a perpetuation of that very system of monopoly, of encouragement of foreign manufactures, and depression of domestic industry, which was so much complained of during our colonial dependence, and which kept all America in a state of poverty and slavish devotion to British interests. Under such circumstances the Constitution would be established, not for the purposes avowed in the preamble, but for the exclusive benefit and advancement of foreign nations, to aid their manufactures and sustain their agriculture. Suppose cotton, rice, tobacco, wheat, corn, sugar, and other raw materials could be or should

hereafter be abundantly produced in foreign countries, under the fostering hands of their governments, by bounties and commercial regulations, so as to become cheaper with such aids than our own; are all our markets to be opened to such products without any restraint, simply because we may not want revenue, to the ruin of our products and industry? Is America ready to give everything to Europe, without any equivalent; and take, in return, whatever Europe may choose to give, upon its own terms? The most servile provincial dependence could not do more evils. Of what consequence would it be that the national government could not tax our exports, if foreign governments might tax them to an unlimited extent, so as to favor their own, and thus to supply us with the same articles by the overwhelming depression of our own by foreign taxation? When it is recollected with what extreme discontent and reluctant obedience the British colonial restrictions were enforced in the manufacturing and navigating States, while they were colonies, it is incredible that they should be willing to adopt a government which should or might entail upon them equal evils in perpetuity. Commerce itself would ultimately be as great a sufferer by such a system as the other domestic interests. It would languish, if it did not perish. Let any man ask himself if New England or the Middle States would ever have consented to ratify a constitution which would afford no protection to their manufactures or home industry. If the Constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers?

§ 1085. It is idle to say that, with the consent of Congress, the States may lay duties on imports or exports, to favor their own domestic manufactures. In the first place, if Congress could constitutionally give such consent for such a purpose, which has been doubted,¹ they would have a right to refuse such consent, and would certainly refuse it, if the result would be what the advocates of free trade contend for. In the next place, it would be utterly impracticable with such consent to protect their manufactures by any such local regulations. To be of any value, they must be general and uniform through the nation. This is not a

¹ See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Debates, App. 345.

matter of theory. Our whole experience under the confederation established beyond all controversy the utter local futility, and even the general mischiefs of independent State legislation upon such a subject. It furnished one of the strongest grounds for the establishment of the Constitution.¹

§ 1086. In the next place, if revenue be the sole legitimate object of an impost, and the encouragement of domestic manufactures be not within the scope of the power of regulating trade, it would follow, as has been already hinted, that no monopolizing or unequal regulations of foreign nations could be counteracted. Under such circumstances, neither the staple articles of subsistence, nor the essential implements for the public safety, could be adequately insured or protected at home by our regulations of commerce. The duty might be wholly unnecessary for revenue; and, incidentally, it might even check revenue. But, if Congress may, in arrangements for revenue, incidentally and designedly protect domestic manufactures, what ground is there to suggest that they may not incorporate this design through the whole system of duties, and select and arrange them accordingly? There is no constitutional measure by which to graduate how much shall be assessed for revenue, and how much for encouragement of home industry. And no system ever yet adopted has attempted, and in all probability none hereafter adopted will attempt, wholly to sever the one object from the other. The constitutional objection in this view is purely speculative, regarding only future possibilities.

§ 1087. But if it be conceded, as it is, that the power to regulate commerce includes the power of laying duties to countervail the regulations and restrictions of foreign nations, then what limits are to be assigned to this use of the power?² If their commercial regulations, either designedly or incidentally, do promote their own agriculture and manufactures, and injuriously affect ours, why may not Congress apply a remedy coextensive with the evil? If Congress have, as cannot be denied, the choice of the means, they may countervail the regulations, not only by the exercise of the *lex talionis* in the same way, but in any other way conducive to the same end. If Great Britain by com-

¹ Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828 ; 4 Elliot's Debates, App. 345.

² See The Federalist, Nos. 11, 12. See *ante*, § 1079.

mercial regulations restricts the introduction of our staple products and manufactures into her own territories, and levies prohibitory duties, why may not Congress apply the same rule to her staple products and manufactures, and secure the same market to ourselves? The truth is, that as soon as the right to retaliate foreign restrictions or foreign policy by commercial regulations is admitted, the question, in what manner, and to what extent it shall be applied, is a matter of legislative discretion, and not of constitutional authority. Whenever commercial restrictions and regulations shall cease all over the world, so far as they favor the nation adopting them, it will be time enough to consider what America ought to do in her own regulations of commerce, which are designed to protect her own industry and counteract such favoritism. It will then become a question not of power, but of policy. Such a state of things has never yet existed. In fact, the concession, that the power to regulate commerce may embrace other objects than revenue, or even than commerce itself, is irreconcilable with the foundation of the argument on the other side.

§ 1088. Besides, the power is to regulate commerce. And in what manner regulate it? Why does the power involve the right to lay duties?¹ Simply because it is a common means of executing the power. If so, why does not the same right exist as to all other means equally common and appropriate? Why does the power involve a right not only to lay duties, but to lay duties for *revenue*, and not merely for the regulation and restriction of commerce, considered *per se*? No other answer can be given but that revenue is an incident to such an exercise of the power. It flows from, and does not create the power. It may constitute the motive for the exercise of the power, just as any other cause may; as, for instance, the prohibition of foreign trade, or the retaliation of foreign monopoly; but it does not constitute the power.

§ 1089. Now, the motive of the grant of the power is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no

¹ See *ante*, §§ 1069, 1079, 1087.

man ever yet doubted the right of Congress to lay duties to promote and encourage domestic navigation, whether in the form of tonnage duties, or other preferences and privileges, either in the foreign trade, or coasting trade, or fisheries.¹ It is as certain as anything human can be, that the sole object of Congress, in securing the vast privileges to American built ships, by such preferences, and privileges, and tonnage duties, was, to encourage the domestic manufacture of ships, and all the dependent branches of business.² It speaks out in the language of all their laws, and has been as constantly avowed and acted on as any single legislative policy ever has been. No one ever dreamed that revenue constituted the slightest ingredient in these laws. They were purely for the encouragement of home manufactures, and home artisans, and home pursuits. Upon what grounds can Congress constitutionally apply the power to regulate commerce to one great class of domestic manufactures, which does not involve the right to encourage all? If it be said that navigation is a part of commerce, that is true. But a power to regulate navigation no more includes a power to encourage the manufacture of ships by tonnage duties than any other manufacture. Why not extend it to the encouragement of the growth and manufacture of cotton and hemp for sails and rigging; of timber, boards, and masts; of tar, pitch, and turpentine; of iron and wool; of sheetings and shirtings; of artisans and mechanics, however remotely connected with it? There are many products of agriculture and manufactures which are connected with the prosperity of commerce as intimately as domestic ship-building. If the one may be encouraged, as a primary motive in regulations of commerce, why may not the others? The truth is, that the encouragement of domestic ship-building is within the scope of the power to regulate commerce, simply because it is a known and ordinary means of exercising the power. It is one of many, and may be used like all others, according to legislative discretion. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power.

§ 1090. Here, then, is a case of laying duties, an ordinary means used in executing the power to regulate commerce; how

¹ See Mr. Jefferson's Report on the Fisheries, 1st Feb. 1791, 10 Amer. Mus. App. 1, &c., 8, &c.

² See Mr. Williamson's Speech in Congress, 8 Amer. Mus. 140.

can it be deemed unconstitutional? If it be said that the motive is not to collect revenue, what has that to do with the power? When an act is constitutional, as an exercise of a power, can it be unconstitutional, from the motives with which it is passed? (a) If it can, then the constitutionality of an act must depend not upon the power, but upon the motives of the legislature. It will follow, as a consequence, that the same act passed by one legislature will be constitutional, and by another unconstitutional. Nay, it might be unconstitutional, as well from its omissions as its enactments, since if its omissions were to favor manufactures, the motive would contaminate the whole law. Such a doctrine would be novel and absurd. It would confuse and destroy all the tests of constitutional rights and authorities. Congress could never pass any law without an inquisition into the motives of every member; and even then they might be re-examinable. Besides, what possible means can there be of making such investigations? The motives of many of the members may be, nay, must be utterly unknown, and incapable of ascertainment by any judicial or other inquiry: they may be mixed up in various manners and degrees; they may be opposite to, or wholly independent of, each other. The Constitution would thus depend upon processes utterly vague and incomprehensible; and the written intent of the legislature upon its words and acts, the *lex scripta*, would be contradicted or obliterated by conjecture, and parol declarations, and fleeting reveries, and heated imaginations. No government on earth could rest for a moment on such a foundation. It would be a constitution of sand, heaped up and dissolved by the flux and reflux of every tide of opinion. Every act of the legislature must therefore be judged of from its object and intent, as they are embodied in its provisions; and if the latter are within the scope of admitted powers, the act must be constitutional, whether the motive for it were wise or just, or otherwise. The manner of applying a power may be an abuse of it; but this does not prove that it is unconstitutional.

(a) If legislation is within the power of the legislative body, the motives of the body in adopting it must be assumed to be correct, and cannot be inquired into. *Ex parte McArdle*, 7 Wall. 514, per Chase, C. J.; *Veazie Bank v. Fenno*, 8 Wall. 533; *Sunbury R. Co. v. Cooper*,

33 Penn. St. 278; *Baltimore v. State*, 15 Md. 376; *People v. Draper*, 15 N. Y. 545, 555; *Ex parte Newman*, 9 Cal. 502; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *Wright v. Defrees*, 8 Ind. 302; *Bradshaw v. Omaha*, 1 Neb. 16; *Humboldt Co. v. Churchill*, 6 Nev. 30.

§ 1091. Passing by these considerations, let the practice of the government and the doctrines maintained by those who have administered it be deliberately examined, and they will be found to be in entire consistency with this reasoning. The very first Congress that ever sat under the Constitution, composed in a considerable degree of those who had framed or assisted in the discussion of its provisions in the State conventions, deliberately adopted this view of the power. And what is most remarkable, upon a subject of deep interest and excitement, which at the time occasioned long and vehement debates, not a single syllable of doubt was breathed from any quarter against the constitutionality of protecting agriculture and manufactures by laying duties, although the intention to protect and encourage them was constantly avowed.¹ Nay, it was contended to be a paramount duty, upon the faithful fulfilment of which the Constitution had been adopted, and the omission of which would be a political fraud, without a whisper of dissent from any side.² It was demanded by the people from various parts of the Union; and was resisted by none.³ Yet State jealousy was never more alive than at this period, and State interests never more actively mingled in the debates of Congress. The two great parties, which afterwards so much divided the country upon the question of a liberal and strict construction of the Constitution, were then distinctly formed, and proclaimed their opinions with firmness and freedom. If, therefore, there had been a point of doubt on which to hang an argument, it cannot be questioned but that it would have been brought into the array of opposition. Such a silence, under such circumstances, is most persuasive and convincing.

§ 1092. The very preamble of the second act passed by Congress is: "Whereas it is necessary for the support of the government, for the discharge of the debts of the United States, and *the encouragement and protection of manufactures*, that duties be laid on goods, wares, and merchandises imported, Be it enacted," &c.⁴ Yet not a solitary voice was raised against it. The right

¹ See 1 Lloyd's Deb. 17, 19, 22, 23, 24, 26, 27, 28, 31, 34, 39, 43, 46, 47, 50, 51, 52, 55, 64 to 69, 71, 72, 74 to 83, 94, 95, 97, 109, 116, 145, 160, 161, 211, 212, 243, 244, 254; *Id.* 144, 183, 194, 206, 207. See also 5 Marshall's Wash. ch. 3, pp. 189, 190.

² See 1 Lloyd's Deb. 24, 160, 161, 243, 244; 4 Elliot's Deb. App. 351, 352.

³ See Grinké's Speech, in Dec. 1828, pp. 58, 59, 63.

⁴ Act of 4th July, 1789. It is not a little remarkable that the culture of cotton was just then beginning in South Carolina; and her statesmen then thought a pro-

and the duty to pass such laws was, indeed, taken so much for granted, that in some of the most elaborate expositions of the government upon the subject of manufactures it was scarcely alluded to.¹ The Federalist itself, dealing with every shadow of objection against the Constitution, never once alludes to such a one; but incidentally commends this power, as leading to beneficial results on all domestic interests.² Every successive Congress since that time have constantly acted upon the system through all the changes of party and local interests. Every successive executive has sanctioned laws on the subject, and most of them have actively recommended the encouragement of manufactures to Congress.³ Until a very recent period, no person in the public councils seriously relied upon any constitutional difficulty. And even now, when the subject has been agitated and discussed with great ability and zeal throughout the Union, not more than five States have expressed an opinion against the constitutional right, while it has received an unequivocal sanction in the others, with an almost unexampled degree of unanimity. And this, too, when in most other respects these States have been in strong opposition to each other upon the general system of politics pursued by the government.

§ 1093. If ever, therefore, contemporaneous exposition and the uniform and progressive operations of the government itself, in all its departments, can be of any weight to settle the construction of the Constitution, there never has been, and there never can be, more decided evidence in favor of the power, than is furnished by the history of our national laws for the encouragement of domestic agriculture and manufactures. To resign an exposition so sanctioned would be to deliver over the country to interminable doubts, and to make the Constitution not a written system of government, but a false and delusive text, upon which every successive age of speculatists and statesmen might build any system suited to their own views and opinions. But if it be added to this that the Constitution gives the power in the most unlimited terms, and neither assigns motives nor objects for its exercise, but leaves these wholly to the discretion of the legisla-

ting duty to aid agriculture was in all respects proper and constitutional. 1 Lloyd's Deb. 79; Id. 210, 211, 212, 244.

¹ Hamilton's Report on Manufactures, in 1791.

² The Federalist, Nos. 10, 35, 41.

³ See 4 Elliot's Debates, App. 353, 354.

ure, acting for the common good and the general interests, the argument in its favor becomes as absolutely irresistible as any demonstration of a moral or political nature ever can be. Without such a power the government would be absolutely worthless, and made merely subservient to the policy of foreign nations, incapable of self-protection or self-support;¹ with it the country will have a right to assert its equality and dignity and sovereignty among the other nations of the earth.²

§ 1094. In regard to the rejection of the proposition in the convention, "to establish *institutions, rewards, and immunities*, for the promotion of agriculture, commerce, trades, and manufactures,"³ it is manifest that it has no bearing on the question. It was a power much more broad in its extent and objects than the power to encourage manufactures by the exercise of another granted power. It might be contended, with quite as much plausibility, that the rejection was an implied rejection of the right to encourage commerce, for that was equally within the scope of the proposition. In truth, it involved a direct power to establish *institutions, rewards, and immunities* for all the great interests of society, and was, on that account, deemed too broad and sweeping. It would establish a general, and not a limited power of government.

§ 1095. Such is a summary (necessarily imperfect) of the reasoning on each side of this contested doctrine. The reader will draw his own conclusions; and these Commentaries have no further aim than to put him in possession of the materials for a proper exercise of his judgment.

§ 1096. When the subject of the regulation of commerce was before the convention, the first draft of the Constitution contained an article, that "no navigation act shall be passed, without the assent of two-thirds of the members present in each house."⁴

¹ 4 Jefferson's Correspondence, 280, 281; 1 Pitkin's Hist. ch. 3, pp. 93 to 106.

² The foregoing summary has been principally abstracted from the Letter of Mr. Madison to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Deb. 345; Mr. Grimké's Speech, in Dec. 1828, in the South Carolina Senate; Mr. Huger's Speech in the South Carolina legislature, in Dec. 1830; Address of the New York Convention of the Friends of Domestic Industry, in Oct. 1831; Mr. Verplanck's Letter to Colonel Drayton, in 1831; Mr. Clay's Speech in the Senate, in Feb. 1832; Mr. Edward Everett's Address to the American Institute, in Oct. 1831; Mr. Hamilton's Report on Manufactures, in 1791; Mr. Jefferson's Report on the Fisheries, in 1791. See also 4 Jefferson's Correspondence, 280, 281.

³ Journal of Convention, p. 261.

⁴ Journal of Convention, p. 222.

This article was afterwards recommended, in a report of a committee, to be stricken out. In the second revised draft it was left out; and a motion to insert such a restriction, to have effect until the year 1808, was negatived by the vote of seven States against three.¹ Another proposition, that no act, regulating the commerce of the United States with foreign powers, should be passed without the assent of two-thirds of the members of each house, was rejected by the vote of seven States against four.² The rejection was probably occasioned by two leading reasons. First, the general impropriety of allowing the minority in a government to control, and in effect to govern, all the legislative powers of the majority. Secondly, the especial inconvenience of such a power, in regard to regulations of commerce, where the proper remedy for grievances of the worst sort might be withheld from the navigating and commercial States, by a very small minority of the other States.³ A similar proposition was made, after the adoption of the Constitution, by some of the States; but it was never acted upon.⁴

§ 1097. The power of Congress also extends to regulate commerce with the Indian tribes. (*a*) This power was not contained in the first draft of the Constitution. It was afterwards referred to the committee on the Constitution (among other propositions) to consider the propriety of giving to Congress the power "to regulate affairs with the Indians, as well within as without the limits of the United States." And, in the revised draft, the committee reported the clause, "and with the Indian tribes," as it now stands.⁵

§ 1098. Under the confederation, the continental congress were invested with the sole and exclusive right and power "of regulating the trade and managing all affairs with the Indians, not *members* of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."⁶

§ 1099. Antecedently to the American revolution, the author-

¹ Journal of Convention, 222, 285, 286, 293, 358, 387. See also 3 American Museum, 62, 419, 420; 2 American Museum, 553; 2 Pitkin's Hist. 261.

² Journal of Convention, 306.

³ See The Federalist, No. 22; 1 Tucker's Black. Comm. App. 253, 375.

⁴ 1 Tucker's Black. Comm. App. 253, 375.

⁵ Journal of Convention, 220, 260, 356.

⁶ Art. 9.

(*a*) See Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641.

ity to regulate trade and intercourse with the Indian tribes, whether they were within or without the boundaries of the colonies, was understood to belong to the prerogative of the British crown.¹ And after the American revolution, the like power would naturally fall to the federal government, with a view to the general peace and interests of all the States.² Two restrictions, however, upon the power were, by the above article, incorporated into the confederation, which occasioned endless embarrassments and doubts. The power of Congress was restrained to Indians, not members of any of the States; and was not to be exercised so as to violate or infringe the legislative right of any State within its own limits. What description of Indians was to be deemed members of a State was never settled under the confederation, and was a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, was to be regulated by an external authority, without so far intruding on the internal rights of legislation, was absolutely incomprehensible. In this case, as in some other cases, the articles of confederation inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.³ The Constitution has wisely disembarrassed the power of these two limitations; and has thus given to Congress, as the only safe and proper depository, the exclusive power, which belonged to the crown in the ante-revolutionary times; a power indispensable to the peace of the States, and to the just preservation of the rights and territory of the Indians.⁴ In the former illustrations of this subject, it was stated that the Indians, from the first settlement of the country, were always treated as distinct, though in some sort as dependent nations. Their territorial rights and sovereignty were respected. They were deemed incapable of carrying on trade or intercourse

¹ *Worcester v. State of Georgia*, 6 Peters's R. 515; *Johnson v. McIntosh*, 8 Wheat. R. 543; *Journal of Congress*, 3 August, 1787, 12th vol. pp 81 to 86; *Id.* 121.

² *Ibid.*

³ *The Federalist*, No. 42; 1 Tuck. Black. Comm. App. 253; 12 *Jour. of Congress*, 3 August, 1787, pp. 81 to 84.

⁴ *Worcester v. The State of Georgia*, 6 Peters's R. 515; 12 *Jour. of Congress*, 3 Aug. 1787, pp. 81 to 84.

with any foreign nations, or of ceding their territories to them. But their right of self-government was admitted; and they were allowed a national existence, under the protection of the parent country, which exempted them from the ordinary operations of the legislative power of the colonies. During the revolution, and afterwards, they were secured in the like enjoyment of their rights and property as separate communities.¹ The government of the United States, since the Constitution, has always recognized the same attributes of dependent sovereignty as belonging to them, and claimed the same right of exclusive regulation of trade and intercourse with them, and the same authority to protect and guarantee their territorial possessions, immunities, and jurisdiction.²

§ 1100. The power, then, given to Congress to regulate commerce with the Indian tribes, extends equally to tribes living within or without the boundaries of particular States, and within or without the territorial limits of the United States. It is, says a learned commentator, wholly immaterial whether such tribes continue seated within the boundaries of a State, inhabit part of a territory, or roam at large over lands to which the United States have no claim. The trade with them is, in all its forms, subject exclusively to the regulation of Congress. And in this particular, also, we trace the wisdom of the Constitution. The Indians, not distracted by the discordant regulations of different States, are taught to trust one great body, whose justice they respect, and whose power they fear.³(a)

¹ *Johnson v. McIntosh*, 8 Wheat. R. 543; *Fletcher v. Peck*, 6 Cranch, 146, 147, per *Johnson, J.*; *The Cherokee Nation v. Georgia*, 5 Peters's R. 1; *Worcester v. The State of Georgia*, 6 Peters's R. 515; *Jackson v. Goodell*, 20 Johnson's R. 193; 3 Kent's Comm. Lect. 50, pp. 303 to 318.

² *Worcester v. State of Georgia*, 6 Peters's R. 515; *Journ. of Congress*, 3 August, 1787, vol. 12, pp. 81 to 84. Mr. Blunt, in his valuable historical sketch of the formation of the confederacy, &c., has given a very full view of the ante-revolutionary as well as post-revolutionary authority exercised in regard to the Indian tribes. See *Blunt's Historical Sketch, &c.* (New York, 1825). Mr. Jefferson's opinion was, that the United States had no more than a right of pre-emption of the Indian lands, not amounting to any dominion, or jurisdiction, or permanent authority whatever; and that the Indians possessed a full, undivided, and independent sovereignty. 4 *Jefferson's Corresp.* 478.

³ *Rawle on the Constitution*, ch. 9, p. 84. See also 1 *Tuck. Black. Comm. App.* 254; 1 *Kent's Comm. Lect.* 50, pp. 308 to 318.

(a) Under the power to regulate commerce with the Indian tribes, Congress may, if deemed necessary, prohibit all intercourse with them except under a li-

§ 1101. It has lately been made a question, whether an Indian tribe, situated within the territorial boundaries of a State, but exercising the powers of government and national sovereignty, under the guarantee of the general government, is a foreign State in the sense of the Constitution, and as such entitled to sue in the courts of the United States. Upon solemn argument, it has been held, that such a tribe is to be deemed politically a State; that is, a distinct political society, capable of self-government; but it is not to be deemed a *foreign state*, in the sense of the Constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupillage; and its relation to the United States resembles that of a ward to a guardian.¹

¹ The Cherokee Nation v. Georgia, 5 Peters's R. 1, 16, 17; Jackson v. Goodell, 20 Johns. R. 198; 3 Kent's Comm. Lect. 50, pp. 308 to 318. In the first volume of Bioren & Duane's edition of the Laws of the United States, there will be found a history of our Indian Treaties and Laws regulating intercourse and trade with the Indians. 1 United States Laws, 597 to 620.

cense. United States v. Cisma, 1 McLean, 254. But it cannot, under this power, pass laws to punish as crimes acts disconnected from any intercourse with the Indians.

United States v. Bailey, 1 McLean, 234; United States v. Cisma, *supra*. See further, as to the power of Congress, United States v. Holliday, 3 Wall. 407.

CHAPTER XVI.

POWER OVER NATURALIZATION AND BANKRUPTCY.

§ 1102. THE next clause is, that Congress “shall have power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”

§ 1103. The propriety of confiding the power to establish a uniform rule of naturalization to the national government seems not to have occasioned any doubt or controversy in the convention. For aught that appears on the journals, it was conceded without objection.¹ Under the confederation, the States possessed the sole authority to exercise the power; and the dissimilarity of the system in different States was generally admitted as a prominent defect, and laid the foundation of many delicate and intricate questions. As the free inhabitants of each State were entitled to all the privileges and immunities of citizens in all the other States,² it followed that a single State possessed the power of forcing into every other State, with the enjoyment of every immunity and privilege, any alien whom it might choose to incorporate into its own society, however repugnant such admission might be to their polity, conveniences, and even prejudices. In effect, every State possessed the power of naturalizing aliens in every other State; a power as mischievous in its nature as it was indiscreet in its actual exercise. In one State, residence for a short time might, and did confer the rights of citizenship. In others, qualifications of greater importance were required. An alien, therefore, incapacitated for the possession of certain rights by the laws of the latter, might, by a previous residence and naturalization in the former, elude at pleasure all their salutary regulations for self-protection. Thus the laws of a single State were preposterously rendered paramount to the

¹ Journ. of Convention, 220, 257. One of the grievances stated in the Declaration of Independence was that the king had endeavored to prevent the population of the States by obstructing the laws for naturalization of foreigners.

² The Confederation, art. 4.

laws of all others, even within their own jurisdiction.¹ And it has been remarked, with equal truth and justice, that it was owing to mere casualty that the exercise of this power under the confederation did not involve the Union in the most serious embarrassments.² There is great wisdom, therefore, in confiding to the national government the power to establish a uniform rule of naturalization throughout the United States. It is of the deepest interest to the whole Union to know who are entitled to enjoy the rights of citizens in each State, since they thereby, in effect, become entitled to the rights of citizens in all the States. If aliens might be admitted indiscriminately to enjoy all the rights of citizens at the will of a single State, the Union might itself be endangered by an influx of foreigners, hostile to its institutions, ignorant of its powers, and incapable of a due estimate of its privileges.

§ 1104. It follows, from the very nature of the power, that, to be useful, it must be exclusive; for a concurrent power in the States would bring back all the evils and embarrassments which the uniform rule of the Constitution was designed to remedy. And, accordingly, though there was a momentary hesitation, when the Constitution first went into operation, whether the power might not still be exercised by the States, subject only to the control of Congress, so far as the legislation of the latter extended, as the supreme law,³ yet the power is now firmly established to be exclusive.⁴ (a) The Federalist, indeed, introduced

¹ The Federalist, No. 42.

² Ibid.

³ *Collet v. Collet*, 2 Dall. R. 294; *United States v. Villato*, 2 Dall. 270; Sergeant on Const. Law, ch. 28 (chap. 30, 2d edit.).

⁴ See The Federalist, Nos. 32, 42; *Chirac v. Chirac*, 2 Wheat. R. 259, 269; Rawle on the Const. ch. 9, pp. 84, 85 to 88; *Houston v. Moore*, 5 Wheat. R. 48, 49; *Golden v. Prince*, 3 Wash. Cir. Ct. R. 313, 322; 1 Kent's Comm. Lect. 19, p. 397; 1 Tuck. Black. Comm. App. 255 to 259; 12 Wheat. R. 277, per Johnson, J.; but see *Id.* 307, per Thompson, J. A question is often discussed under this head, how far a person

(a) That the power over naturalization is exclusive, see further, *Thurlow v. Massachusetts*, 5 How. 585; *Smith v. Turner*, 7 How. 283. And as to the right of expatriation, see *Dana's Wheaton*, p. 122 note; *Lawrence's Wheaton*, Appendix, p. 891. A man may, however, be a citizen of the United States without being a citizen of a State. "He must reside

within the State to make him a citizen of it; but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." *Slaughter House Cases*, 16 Wall. 36, 72; 14th Amend. to U. S. Const. See also *United States v. Cruikshank*, 92 U. S. 542. Further as to citizenship, see §§ 1693-1695, 1932, *et seq.*

this very case, as entirely clear, to illustrate the doctrine of an exclusive power by implication, arising from the repugnancy of a similar power in the States. "This power must necessarily be exclusive," say the authors; "because, if each State had power to prescribe a distinct rule, there could be no uniform rule."¹(a)

§ 1105. The power to pass laws on the subject of bankruptcies was not in the original draft of the Constitution. The original article was committed to a committee, together with the following proposition: "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange." The committee subsequently made a report in favor of incorporating the clause on the subject of bankruptcies into the Constitution; and it was adopted by a vote of nine States against one.² The brevity with which this subject is treated by the Federalist is quite remarkable. The only passage in that elaborate commentary, in which the subject is treated, is as follows: "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds, where the parties or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn in question."³

§ 1106. The subject, however, deserves a more exact consideration. Before the adoption of the Constitution, the States severally possessed the exclusive right, as matter belonging to their general sovereignty, to pass laws upon the subject of bankruptcy

has a right to throw off his national allegiance, and to become the subject of another country, without the consent of his native country. This is usually denominated the right of expatriation. It is beside the purpose of these commentaries to enter into any consideration of this subject, as it does not properly belong to any constitutional inquiry. It may be stated, however, that there is no authority which has affirmatively maintained the right (unless provided for by the laws of the particular country), and there is a very strong current of reasoning on the other side, independent of the known practice and claims of the nations of modern Europe. See Rawle on the Const. ch. 9, pp. 85 to 101; Sergeant on Const. Law. ch. 23 (ch. 30); 2 Kent's Comm. Lect. 25, pp. 35 to 42.

¹ The Federalist, No. 32.

² Journ. of Convention, 220, 305, 320, 321, 357.

³ The Federalist, No. 42.

(a) A bankrupt law is not invalid on the ground of want of uniformity, because of its adoption of the differing State exemption laws. *In re Beckerford*, 1 Dillon, 45.

and insolvency.¹ Without stopping at present to consider what is the precise meaning of each of these terms, as contradistinguished from the other, it may be stated, that the general objects of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an appropriation of the property of their debtors *pro tanto* to the discharge of their debts, whenever the latter are unable to discharge the whole amount; and, on the other hand, to relieve unfortunate and honest debtors from perpetual bondage to their creditors, either in the shape of unlimited imprisonment to coerce payment of their debts, or of an absolute right to appropriate and monopolize all their future earnings. The latter course obviously destroys all encouragement to industry and enterprise on the part of the unfortunate debtor, by taking from him all the just rewards of his labor, and leaving him a miserable pittance, dependent upon the bounty or forbearance of his creditors. The former is, if possible, more harsh, severe, and indefensible.² It makes poverty and misfortune, in themselves sufficiently heavy burdens, the subject or the occasion of penalties and punishments. Imprisonment, as a civil remedy, admits of no defence, except as it is used to coerce fraudulent debtors to yield up their present property to their creditors, in discharge of their engagements. But when the debtors have no property, or have yielded up the whole to their creditors, to allow the latter at their mere pleasure to imprison them, is a refinement in cruelty, and an indulgence of private passions, which could hardly find apology in an enlightened despotism; and are utterly at war with all the rights and duties of free governments. Such a system of legislation is as unjust as it is unfeeling. It is incompatible with the first precepts of Christianity; and is a living reproach to the nations of Christendom, carrying them back to the worst ages of paganism.³ One of the first duties of legislation, while it provides amply for the sacred obligation of contracts, and the remedies to enforce them, certainly is, *pari passu*, to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from a fair enjoyment of the common benefits of society, and robs his family of the fruits of his labor and the benefits of his paternal superintendence.

¹ *Sturges v. Crowninshield*, 4 Wheat. R. 122, 203, 204; Rawle on the Constitution, ch. 9, pp. 101, 102,

² See 1 Tucker's Black. Comm. App. 259.

³ See 2 Black. Comm. 471, 472, 473. See also 1 Tuck. Black. Comm. App. 259.

A national government which did not possess this power of legislation would be little worthy of the exalted functions of guarding the happiness and supporting the rights of a free people. It might guard against political oppressions, only to render private oppressions more intolerable and more glaring.

§ 1107. But there are peculiar reasons, independent of these general considerations, why the government of the United States should be entrusted with this power. They result from the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the States. It is obvious, that if the power is exclusively vested in the States, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency as best suits its own local interests and pursuits. Under such circumstances no uniformity of system or operations can be expected. One State may adopt a system of general insolvency; another, a limited or temporary system; one may relieve from the obligation of contracts; another only from imprisonment; another may adopt a still more restrictive course of occasional relief; and another may refuse to act in any manner upon the subject. The laws of one State may give undue preferences to one class of creditors, as, for instance, to creditors by bond, or judgment; another may provide for an equality of debts, and a distribution *pro rata* without distinction among all. One may prefer creditors living within the State to all living without; securing to the former an entire priority of payment out of the assets. Another may, with a more liberal justice, provide for the equal payment of all, at home and abroad, without favor or preference. In short, diversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring States. What is here stated is not purely speculative. It has occurred among the American States in the most offensive forms, without any apparent reluctance or compunction on the part of the offending State. (a) There will always be found in every State a large mass of politicians, who will deem it more safe to consult their own temporary interests and popularity, by a narrow system of preferences, than to enlarge the boundaries, so as to give to dis-

(a) It occurred also among the colonies before the revolution. 2 Graham's Hist. App. 498, 499.

tant creditors a fair share of the fortune of a ruined debtor. There can be no other adequate remedy than giving a power to the general government to introduce and perpetuate a uniform system.¹ (a)

§ 1108. In the next place, it is clear that no State can introduce any system which shall extend beyond its own territorial limits, and the persons who are subject to its jurisdiction. Creditors residing in other States cannot be bound by its laws; and debts contracted in other States are beyond the reach of its legislation. It can neither discharge the obligation of such contracts, nor touch the remedies which relate to them in any other jurisdiction. So that the most meritorious insolvent debtor will be harassed by new suits, and new litigations, as often as he moves out of the State boundaries.² His whole property may be absorbed by his creditors residing in a single State, and he may be left to the severe retributions of judicial process in every other State in the Union. Among a people whose general and commercial intercourse must be so great and so constantly increasing as in the United States, this alone would be a most enormous evil, and bear with peculiar severity upon all the commercial States. Very few persons engaged in active business will be without debtors or creditors in many States in the Union. The evil is incapable of being redressed by the States. It can be adequately redressed only by the power of the Union. One of the most pressing grievances, bearing upon commercial, manufacturing, and agricultural interests at the present moment, is the total want of a general system of bankruptcy. It is well known that the power has lain dormant, except for a short period, ever since the Constitution was adopted; and the excellent system then put into operation was repealed before it had any fair trial, upon grounds generally believed to be wholly beside its merits, and from causes more easily understood than deliberately vindicated.³

¹ See Mr. Justice Johnson's Opinion in *Ogden v. Saunders*, 12 Wheat. R. 274, 275.

² 2 Kent's Comm. Lect. 37, pp. 323, 324; Sergeant on Const. Law, ch. 28 [ch. 30]; Mr. Justice Johnson in 12 Wheat. R. 273 to 275.

³ See the Debate on the Bankrupt Bill in the House of Representatives in the winter session of 1818; Webster's Speeches, p. 510, &c. It is a matter of regret that the learned mind of Mr. Chancellor Kent should have attached so much importance to a hasty, if not a petulant remark of Lord Eldon on this subject. There is no commercial State in Europe which has not for a long period possessed a system of bankrupt or

(a) See *Silverman's Case*, 2 Abb. U. S. 243.

§ 1109. In the next place, the power is important in regard to foreign countries, and to our commercial credits and intercourse with them. Unless the general government were invested with authority to pass suitable laws, which should give reciprocity and equality in cases of bankruptcies here, there would be danger that the State legislation might, by undue domestic preferences and favors, compel foreign countries to retaliate; and instead of allowing creditors in the United States to partake an equality of benefits in cases of bankruptcies, to postpone them to all others. The existence of the power is, therefore, eminently useful; first, as a check upon undue State legislation; and, secondly, as a means of redressing any grievances sustained by foreigners in commercial transactions.

§ 1110. It cannot but be matter of regret that a power so salutary should have hitherto remained, as has been already intimated, a mere dead letter. It is extraordinary that a commercial nation, spreading its enterprise through the whole world, and possessing such an infinitely varied internal trade, reaching almost to every cottage in the most distant States, should voluntarily surrender up a system which has elsewhere enjoyed such general favor as the best security of creditors against fraud, and the best protection of debtors against oppression.

§ 1111. What laws are to be deemed bankrupt laws within the meaning of the Constitution has been a matter of much forensic discussion and argument. Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said that laws which merely liberate the person of the debtor are insolvent laws, and those which discharge the contract are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. In some of the States, laws, known as insolvent laws, discharge the person only; in others, they discharge the con-

insolvent laws. England has had one for more than three centuries. And at no time have the Parliament or people shown any intention to abandon the system. On the contrary, by recent acts of Parliament, increased activity and extent have been given to the bankrupt and insolvent laws. It is easy to exaggerate the abuses of the system, and point out its defects in glowing language. But the silent and potent influences of the system in its beneficent operations are apt to be overlooked, and are rarely sufficiently studied. What system of human legislation is not necessarily imperfect! Yet who would, on that account, destroy the fabric of society? 2 Kent's Comm. Lect. 37, pp. 321 to 324, and note (b); *Id.* (2d ed.) pp. 391, 392.

tract. And if Congress were to pass a bankrupt act, which should discharge the person only of the bankrupt, and leave his future acquisitions liable to his creditors, there would be great difficulty in saying that such an act was not in the sense of the Constitution a bankrupt act, and so within the power of Congress.¹ Again, it has been said that insolvent laws act on imprisoned debtors only at their own instance, and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation,² it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense insolvents, or bankrupts. And if an act of Congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying that the act was unconstitutional, and the commission a nullity.³ It is believed that no laws ever were passed in America by the colonies or States, which had the technical denomination of "bankrupt laws." But insolvent laws, quite coextensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and State legislation. No distinction was ever practically, or even theoretically attempted to be made between bankruptcies and insolvencies. And a historical review of the colonial and State legislation will abundantly show that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws.⁴

§ 1112. The truth is, that the English system of bankruptcy, as well as the name, was borrowed from the continental juris-

¹ *Sturges v. Crowninshield*, 4 Wheat. R. 122, 194, 202.

² It was not true in England at the time of the American revolution; for under the insolvent act, commonly called the "Lords' Act of 32 Geo. 2, ch. 28," the creditors of the insolvent were equally with himself entitled to proceed to procure the benefit of the act *ex parte*. See 3 Black. Comm. 416, and note 3 of Mr. Christian. The present system of bankruptcy in England has been enlarged, so as now to include voluntary and concerted cases of bankruptcy. And the insolvent system is applied to all other imprisoned debtors, not within the bankrupt laws. See Petersdorff's Abridgment, titles *Bankrupt* and *Insolvent*.

³ *Sturges v. Crowninshield*, 4 Wheat. R. 122, 194.

⁴ *Sturges v. Crowninshield*, 4 Wheat. R. 122, 194, 198, 203, 2 Kent's Comm. Lect. 37, p. 321, &c.

prudence, and derivatively from the Roman law. "We have fetched," says Lord Coke, "as well the name as the wickedness of bankrupts from foreign nations; for *banque* in the French is *mensa*, and a banquer or eschanger is *mensarius*; and *route* is a sign or mark, as we say a cart route is the sign or mark where the cart hath gone. Metaphorically it is taken for him that hath wasted his estate, and removed his bank, so as there is left but a mention thereof. Some say it should be derived from *banque* and *rumpue*, as he that hath broken his bank or state."¹ Mr. Justice Blackstone inclines strongly to this latter intimation, saying, that the word "is derived from the word *bancus*, or *banque*, which signifies the table or counter of a tradesman, and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone. It is observable that the first statute against bankrupt is 'against such persons as do make bankrupt' (34 Hen. 8, ch. 4), which is a literal translation of the French idiom, *qui font banque route*."² (a)

§ 1113. The system of discharging persons who were unable to pay their debts was transferred from the Roman law into continental jurisprudence at an early period. To the glory of Christianity let it be said, that the law of cession (*cessio bonorum*) was introduced by the Christian emperors of Rome, whereby, if a debtor ceded or yielded up all his property to his creditors, he was secured from being dragged to jail *omni quoque corporali cruciatu semoto*; for as the emperor (Justinian) justly observed, *inhumanum erat spoliatum fortunæ suis in solidum damnari*;³ a noble declaration, which the American republics would do well to follow, and not merely to praise. Neither by the Roman nor the continental law was the *cessio bonorum* confined to traders, but it extended to all persons. It may be added, that the *cessio bonorum* of the Roman law, and that which at present prevails in most parts of the continent of Europe, only exempted the debtor from imprisonment. It did not release or discharge the debt, or exempt the future acquisitions of the

¹ 4 Inst. ch. 63.

² 2 Black. Comm. 472, note; Cooke's Bankrupt Laws, Introd. ch. 1. The modern French phrase in the Code of Commerce is *la banqueroute*. "Tout commerçant failli, &c., est en état de banqueroute." Art. 438.

³ 2 Black. Comm. 472, 473; Cod. Lib. 7, tit. 71, *per totum*; Ayliffe's Pandects, B. 4, tit. 14.

(a) See Skeat's Etym. Dict. "Bankrupt."

debtor from execution for the debt. The English statute, commonly called the "Lords' Act," went no further than to discharge the debtor's person. And it may be laid down as the law of Germany, France, Holland, Scotland, and England, that their insolvent laws are not more extensive in their operation than the *cessio bonorum* of the civil law. In some parts of Germany, we are informed by Huberus and Heineccius, a *cessio bonorum* does not even work a discharge of the debtor's person, and much less of his future effects.¹ But with a view to the advancement of commerce, and the benefit of creditors, the systems now commonly known by the name of "bankrupt laws" were introduced, and allowed a proceeding to be had at the instance of the creditors against an unwilling debtor, when he did not choose to yield up his property; or, as it is phrased in our law, bankrupt laws were originally proceedings *in invitum*. In the English system the bankrupt laws are limited to persons who are traders, or connected with matters of trade and commerce, as such persons are peculiarly liable to accidental losses, and to an inability of paying their debts without any fault of their own.²(a) But this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors.³

§ 1114. How far the power of Congress to pass uniform laws on the subject of bankruptcies supersedes the authority of State legislation on the same subject, has been a matter of much elaborate forensic discussion. It has been strenuously maintained by some learned minds, that the power in Congress is exclusive of that of the States; and, whether exerted or not, it supersedes

¹ 1 Kent's Comm. Lect. 19, p. 336; 1 Domat, B. 4, tit. 5, §§ 1, 2.

² 2 Black. Comm. 473, 474.

³ See Debate on the Bankrupt Bill in the House of Representatives, Feb. 1818; 4 Elliot's Debates, 282 to 284. Perhaps as satisfactory a description of a bankrupt law as can be framed is, that it is a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provisions for cases of persons failing to pay their debts. An amendment was proposed by the State of New York to the Constitution at the time of adopting it, that the power of passing uniform bankrupt laws should extend only to merchants and other traders; but it did not meet general favor. Journal of Convention, Supplement, p. 436.

(a) This has long been otherwise.

State legislation.¹ On the other hand, it has been maintained that the power in Congress is not exclusive; that when Congress has acted upon the subject, to the extent of the national legislation, the power of the States is controlled and limited; but when unexerted, the States are at liberty to exercise the power in its full extent, unless so far as they are controlled by other constitutional provisions. And this latter opinion is now firmly established by judicial decisions.² (a) As this doctrine seems now to have obtained a general acquiescence, it does not seem necessary to review the reasoning on which the different opinions are founded; although, as a new question, it is probably as much open to controversy as any one which has ever given rise to judicial argumentation. But upon all such subjects it seems desirable to adopt the sound practical maxim, *Interest reipublicæ, ut finis sit litum*.

§ 1115. It is, however, to be understood, that although the States still retain the power to pass insolvent and bankrupt laws, that power is not unlimited, as it was before the Constitution. It does not, as will be presently seen, extend to the passing of insolvent or bankrupt acts which shall discharge the obligation of antecedent contracts. It can discharge such contracts only as are made subsequently to the passing of such acts, and such as are made within the State between citizens of the same State. It does not extend to contracts made with a citizen of another State within the State, nor to any contracts made in other States.³ (b)

¹ See *Golden v. Prince*, 3 Wash. Circ. R. 313; *Ogden v. Saunders*, 12 Wheat. R. 264, 267 to 270, per Washington, J. It is well known that Mr. Justice Washington, was not alone in the court in this opinion in the original case (*Sturges v. Crowninshield*, 4 Wheat. R. 122) in which it was first decided.

² *Sturges v. Crowninshield*, 4 Wheat. R. 122, 191 to 196; *Id.* 198 to 202; *Ogden v. Saunders*, 12 Wheat. R. 273, 275, 280, 306, 310, 314, 335, 369.

³ *Ogden v. Saunders*, 12 Wheat. R. 122, 369; *Boyle v. Zacharie*, 6 Peters, R. 348; 2 Kent, Comm. Lect. 37, pp. 323, 324; *Sergeant on Const. Law*, ch. 28, p. 309 [ch. 30, p. 322]; *Rawle on the Constitution*, ch. 9, pp. 101, 102.

(a) *Tua v. Carriere*, 117 U. S. 201.

(b) The following is a summary of the decisions of the Supreme Court of the United States as to the power of the States over the subject of bankruptcy and insolvency:—

1. The several States have power to legislate on the subject of bankrupt and

insolvent laws, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy, which authority, when exercised, is paramount, and State enactments in conflict with those of Congress upon the subject must give way. *Sturges v. Crowninshield*, 4 Wheat. 122; *Farmers'*

& *Mechanics' Bank v. Smith*, 6 Wheat. 131; *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 229; *Tua v. Carriere*, 117 U. S. 201.

2. Such State laws, however, discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debts, cannot constitutionally be made to apply to contracts entered into before they were passed, but they may be made applicable to such future contracts as can be considered as having been made in reference to them. *Ogden v. Saunders*, 12 Wheat. 213.

3. Contracts made within a State where an insolvent law exists, between citizens of that State, are to be considered as made in reference to the law, and are subject to its provisions. But the law cannot apply to a contract made in one State between a citizen thereof, and a citizen of another State. *Ogden v. Saunders*, 12 Wheat. 213; *Springer v. Foster*, 2 Story, 387; *Boyle v. Zacharie*, 6 Pet. 348; *Woodhull v. Wagner*, Baldw. 300; *Suydam v. Broadnax*, 14 Pet. 75; *Cook v. Moffat*, 5 How. 310; *Baldwin v. Hale*, 1 Wall. 231. Nor to contracts not made within the State, even though between citizens of the same State. *M'Millan v.*

M'Neill, 4 Wheat. 209. And where the contract is made between a citizen of one State and a citizen of another, the circumstance that the contract is made payable in the State where the insolvent law exists will not render such contract subject to be discharged under the law. *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank of Newbury*, Id. 234; *Gilman v. Lockwood*, 4 Wall. 409. If, however, the creditor makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was excluded by the Constitution from being affected by the law. *Clay v. Smith*, 3 Pet. 411; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409.

4. During the existence of a national bankruptcy law, State laws of the kind are suspended, reviving when the national law terminates. *Tua v. Carriere*, 117 U. S. 201; *Ward v. Proctor*, 7 Met. 318; *Lothrop v. Highland Foundry Co.*, 128 Mass. 120; *Orr v. Lisso*, 33 La. An. 476. And this though the State law was passed while the national law was in existence. *Tua v. Carriere*, *supra*.

CHAPTER XVII.

POWER TO COIN MONEY AND FIX THE STANDARD OF WEIGHTS AND MEASURES.

§ 1116. THE next power of Congress is "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." (a)

§ 1117. Under the confederation, the continental congress had delegated to them "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the States," and "fixing the standard of weights and measures throughout the United States." It is observable that, under the confederation, there was no power given to regulate the value of foreign coin, an omission which, in a

(a) After the breaking out of the civil war in 1861, it was deemed necessary by Congress, in order to supply the means of carrying on the war, to issue a large amount of treasury notes, and to make them a legal tender in payment of private debts, and also of all public dues except duties on imports and interest on the public debt. These notes thereupon, to a large extent, became the circulating medium of the country, and gold and silver ceased to be used in ordinary traffic, except on the Pacific slope. The constitutional validity of the Legal Tender Acts of Congress was strongly contested, especially in their application to pre-existing debts, but it was generally sustained by the State courts. The question did not come before the Supreme Court of the United States for decision until the case of *Hepburn v. Griswold*, decided in December, 1869, and reported in 8 Wallace, 603. In that case a majority of the court (Chase, C. J., Nelson, Clifford, and Field, JJ.) held that the

acts applied to debts created before the acts were passed, of which the case before the court was an instance, and that they were not warranted by the Constitution. Miller, Swayne, and Davis, JJ., dissented. A year later, however, this decision was overruled, and the acts sustained, as well in their application to pre-existing debts as to those subsequently contracted. This result was concurred in by Strong and Bradley, JJ. (appointed since the former decision), Miller, Davis, and Swayne, and dissented from by the Chief Justice and Nelson, Clifford, and Field, JJ. See *Legal Tender Cases* (*Knox v. Lee*), 12 Wall. 457; *Dooley v. Smith*, 13 Wall. 604; *Railroad Co. v. Johnson*, 15 Wall. 195; *Maryland v. Railroad Co.*, 22 Wall. 105.

In *Legal Tender Cases* (*Juilliard v. Greenman*), 110 U. S. 421, the power of Congress to make paper money a legal tender for times of peace as well as war was upheld; Field, J., dissenting.

great measure, would destroy any uniformity in the value of the current coin, since the respective States might, by different regulations, create a different value in each.¹ The Constitution has, with great propriety, cured this defect; and, indeed, the whole clause, as it now stands, does not seem to have attracted any discussion in the convention.² It has been justly remarked, that the power "to coin money" would, doubtless, include that of regulating its value, had the latter power not been expressly inserted. But the Constitution abounds with pleonasms and repetitions of this nature.³

§ 1118. The grounds upon which the general power to coin money and regulate the value of foreign and domestic coin is granted to the national government cannot require much illustration in order to vindicate it. The object of the power is to produce uniformity of value throughout the Union, and thus to preclude us from the embarrassments of a perpetually fluctuating and variable currency. Money is the universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or, it is a sign which represents the respective values of all commodities.⁴ It is, therefore, indispensable for the wants and conveniences of commerce, domestic as well as foreign. The power to coin money is one of the ordinary prerogatives of sovereignty, and is almost universally exercised, in order to preserve a proper circulation of good coin of a known value in the home market. In order to secure it from debasement, it is necessary that it should be exclusively under the control and regulation of the government; for if every individual were permitted to make and circulate what coin he should please, there would be an opening to the grossest frauds and impositions upon the public, by the use of base and false coin. And the same remark applies, with equal force, to foreign coin, if allowed to circulate freely in a country without any control by the government. Every civilized government, therefore, with a view to prevent such abuses, to facilitate exchanges, and thereby to encourage all sorts of industry and commerce, as well as to guard itself against the embarrassments of an undue scar-

¹ The Federalist, No. 42.

² Journ. of Convention, pp. 220, 257, 357.

³ Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

⁴ 1 Black. Comm. 276.

city of currency, injurious to its own interests and credits, has found it necessary to coin money, and affix to it a public stamp and value, and to regulate the introduction and use of foreign coins.¹ In England, this prerogative belongs to the crown, and in former ages it was greatly abused; for base coin was often coined and circulated by its authority, at a value far above its intrinsic worth, and thus taxes of a burdensome nature were laid indirectly upon the people.² There is great propriety, therefore, in confiding it to the legislature, not only as the more immediate representatives of the public interests, but as the more safe depositaries of the power.³

§ 1119. The only question which could properly arise under our political institutions is, whether it should be confided to the national or to the State government. It is manifest that the former could alone give it complete effect, and secure a wholesome and uniform currency throughout the Union. The varying standards and regulations of the different States would introduce infinite embarrassments and vexations in the course of trade, and often subject the innocent to the grossest frauds. The evils of this nature were so extensively felt, that the power was unhesitatingly confided, by the articles of confederation, exclusively to the general government,⁴ notwithstanding the extraordinary jealousy which pervades every clause of that instrument. But the concurrent power thereby reserved to the States (as well as the want of a power to regulate the value of foreign coin) was, under that feeble pageant of sovereignty, soon found to destroy the whole importance of the grant. The floods of depreciated paper-money, with which most of the States of the Union during the last war, as well as the revolutionary war with England, were inundated, to the dismay of the traveller and the ruin of commerce, afford a lively proof of the mischiefs of a currency exclusively under the control of the States.⁵

¹ Smith's *Wealth of Nations*, B. 1, ch. 4.

² 1 Black. Comm. 278; Christian's note, 21; Davies's Rep. 48; 1 Hale's Pl. Cr. 192 to 196.

³ Tuck. Black. Comm. App. 261.

⁴ Art. 9.

⁵ During the late war with Great Britain (1812 to 1814) in consequence of the banks of the Middle, and Southern, and Western States having suspended specie payments for their bank-notes, they depreciated as low as twenty-five per cent discount from their nominal value. The duties on imports were, however, paid and received in the local currency; and the consequence was, that goods imported at Baltimore paid

§ 1120. It will be hereafter seen that this is an exclusive power in Congress, the States being expressly prohibited from coining money. And it has been said by an eminent statesman,¹ that it is difficult to maintain, on the face of the Constitution itself and independent of long-continued practice, the doctrine, that the States, not being at liberty to coin money, can authorize the circulation of bank paper, as currency, at all. His reasoning deserves grave consideration, and is to the following effect: The States cannot coin money. Can they, then, coin that which becomes the actual and almost universal substitute for money? Is not the right of issuing paper, intended for circulation in the place and as the representative of metallic currency, derived merely from the power of coining and regulating the metallic currency? Could Congress, if it did not possess the power of coining money and regulating the value of foreign coins, create a bank with the power to circulate bills? It would be difficult to make it out. Where, then, do the States, to whom all control over the metallic currency is altogether prohibited, obtain this power? It is true that, in other countries, private bankers, having no legal authority over the coin, issue notes for circulation. But this they do always with the consent of government, express or implied; and government restrains and regulates all their operations at its pleasure. It would be a startling proposition in any other part of the world, that the prerogative of coining money, held by government, was liable to be defeated, counteracted, or impeded by another prerogative, held in other hands, of authorizing a paper circulation. It is further to be observed, that the States cannot issue bills of credit; (a) not that they cannot make them a legal tender, but that they cannot issue them at all. This is a clear indication of the intent of the Constitution to restrain the States as well from establishing a paper circulation as from interfering with the metallic circulation. Banks have been created by States with no capital whatever, their notes being put in circulation simply on the credit of the State. What

twenty per cent less duty than the same goods paid when imported into Boston. This was a plain practical violation of the provision of the Constitution, that all duties, imposts, and excises shall be *uniform*.

¹ Mr. Webster's Speech on the Bank of the United States, 25th and 28th of May, 1832.

(a) See *Poindexter v. Greenhow*, 114 U. S. 270.

are the issues of such banks but bills of credit issued by the State?¹ (a)

§ 1121. Whatever may be the force of this reasoning, it is probably too late to correct the error, if error there be, in the assumption of this power by the States, since it has an inveterate practice in its favor through a very long period, and indeed ever since the adoption of the Constitution.

§ 1122. The other power, "to fix the standard of weights and measures," was, doubtless, given from like motives of public policy, for the sake of uniformity, and the convenience of commerce.² Hitherto, however, it has remained a dormant power, from the many difficulties attendant upon the subject, although it has been repeatedly brought to the attention of Congress in most elaborate reports.³ Until Congress shall fix a standard, the understanding seems to be, that the States possess the power to fix their own weights and measures;⁴ or, at least, the existing standards at the adoption of the Constitution remain in full force. Under the confederation, Congress possessed the like exclusive power.⁵ In England, the power to regulate weights and measures is said by Mr. Justice Blackstone to belong to the royal prerogative.⁶ But it has been remarked by a learned commentator on his work, that the power cannot, with propriety, be referred to the king's prerogative; for, from Magna Charta to the present time, there are above twenty acts of Parliament to fix and establish the standard and uniformity of weights and measures.⁷

§ 1123. The next power of Congress is "to provide for the punishment of counterfeiting the securities and current coin of the United States." This power would naturally flow, as an incident, from the antecedent powers to borrow money, and regu-

¹ This opinion is not peculiar to Mr. Webster. It was maintained by the late Hon. Samuel Dexter, one of the ablest statesmen and lawyers who have adorned the annals of our country.

² The Federalist, No. 42.

³ Among these none are more elaborate and exact than that of Mr. Jefferson and Mr. J. Q. Adams, while they were respectively at the head of the department of State.

⁴ Rawle on the Constitution, ch. 9, p. 102.

⁵ Art. 9.

⁶ 1 Black. Comm. 276.

⁷ 1 Black. Comm. 276, Christian's note (16).

(a) But see *Briscoe v. Bank of Kentucky*, 11 Pet. 257.

late the coinage; and, indeed, without it those powers would be without any adequate sanction. This power would seem to be exclusive of that of the States, since it grows out of the Constitution, as an appropriate means to carry into effect other delegated powers not antecedently existing in the States.¹(a)

¹ See Rawle on Constitution, ch. 9, p. 103; The Federalist, No 42.

(a) See *Mattison v. State*, 3 Mo. 421. In the case of *Fox v. The State of Ohio*, 5 How. 433, it was decided that the States had power to pass laws to punish the *passing* of counterfeit money, and some of the language of the court is perhaps inconsistent with what is stated in the text. See also *United States v. Marigold*, 9 How. 560; *Moore v. People*, 14 How. 13.

Under its power to provide for the punishment of counterfeiting the securities and current coin of the United States, Congress may pass laws to punish the bringing of counterfeit coin in the similitude of coins of the United States into the country, and the passing and uttering of the same. *United States v. Marigold*, 9 How. 560.

CHAPTER XVIII.

POWER TO ESTABLISH POST-OFFICES AND POST-ROADS.

§ 1124. THE next power of Congress is, "to establish post-offices and post-roads." The nature and extent of this power, both theoretically and practically, are of great importance, and have given rise to much ardent controversy. It deserves, therefore, a deliberate examination. It was passed over by the Federalist with a single remark, as a power not likely to be disputed in its exercise, or to be deemed dangerous by its scope. The "power," says the Federalist, "of establishing post-roads must, in every view, be a harmless power; and may, perhaps, by judicious management, become productive of great public convenience. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care."¹ One cannot but feel, at the present time, an inclination to smile at the guarded caution of these expressions, and the hesitating avowal of the importance of the power. It affords, perhaps, one of the most striking proofs, how much the growth and prosperity of the country have outstripped the most sanguine anticipations of our most enlightened patriots.

§ 1125. The post-office establishment has already become one of the most beneficent and useful establishments under the national government.² It circulates intelligence of a commercial, political, intellectual, and private nature, with incredible speed and regularity. It thus administers in a very high degree to the comfort, the interests, and the necessities of persons in every rank and station of life. It brings the most distant places and persons, as it were, in contact with each other; and thus softens the anxieties, increases the enjoyments, and cheers the solitude of millions of hearts. It imparts a new influence and impulse to private intercourse; and, by a wider diffusion of knowledge, enables political rights and duties to be performed with more uniformity

¹ The Federalist, No. 42.

² 1 Tuck. Black. Comm. App. 265; Rawle on the Const. ch. 9, p. 103.

and sound judgment. It is not less effective, as an instrument of the government in its own operations. In peace it enables it without ostentation or expense to send its orders, and direct its measures for the public good, and transfer its funds, and apply its powers, with a facility and promptitude which, compared with the tardy operations and imbecile expedients of former times, seem like the wonders of magic. In war it is, if possible, still more important and useful, communicating intelligence vital to the movements of armies and navies, and the operations and duties of warfare, with a rapidity which, if it does not always insure victory, at least, in many instances, guards against defeat and ruin. Thus, its influences have become, in a public as well as private view, of incalculable value to the permanent interests of the Union. It is obvious at a moment's glance at the subject, that the establishment in the hands of the States would have been wholly inadequate to these objects; and the impracticability of a uniformity of system would have introduced infinite delays and inconveniences; and burdened the mails with an endless variety of vexatious taxations and regulations. No one accustomed to the retardations of the post in passing through independent States on the continent of Europe, can fail to appreciate the benefits of a power which pervades the Union. The national government is that alone which can safely or effectually execute it, with equal promptitude and cheapness, certainty and uniformity. Already the post-office establishment realizes a revenue exceeding two millions of dollars, from which it defrays all its own expenses, and transmits mails in various directions over more than one hundred and twenty thousand miles. It transmits intelligence in one day to distant places, which, when the Constitution was first put into operation, was scarcely transmitted through the same distance in the course of a week.¹ The rapid-

¹ In the American Almanac and Repository published at Boston in 1830 (a very valuable publication), there is, at page 217, a tabular view of the number of post-offices, and amounts of postage, and net revenue and extent of roads in miles travelled by the mail for a large number of years between 1790 and 1828. In 1790 there were seventy-five post-offices, and the amount of postage was \$37,935, and the number of miles travelled was 1,875. In 1828 there were 7,530 post-offices, and the amount of postage was \$1,659,915, and the number of miles travelled was 115,176. See also American Almanac for 1832, p. 134. And from Dr. Lieber's *Encyclopædia Americana* (article *Posts*), it appears that, in 1831, the amount of postage was \$1,997,811, and the number of miles travelled 15,468,692. The first post-office ever established in America seems

ity of its movements has been in a general view doubled within the last twenty years. There are now more than eight thousand five hundred post-offices in the United States; and at every session of the legislature new routes are constantly provided for, and new post-offices established. It may, therefore, well be deemed a most beneficent power, whose operations can scarcely be applied except for good, accomplishing in an eminent degree some of the high purposes set forth in the preamble of the Constitution, forming a more perfect Union, providing for the common defence, and promoting the general welfare.

§ 1126. Under the confederation (art. 9), Congress was invested with the sole and exclusive power of "establishing and regulating post-offices *from one State to another* throughout the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office."¹ How little was accomplished under it will be at once apparent from the fact, that there were but seventy-five post-offices established in all the United States in the year 1789; that the whole amount of postage in 1790 was only \$37,935; and the number of miles travelled by the mails only 1,875.² (a) This may be in part attributable to the state of the country, and the depression of all the commercial and other interests of the country. But the power itself was so crippled by the confederation, that it could accomplish little. The national government did not possess any power, except to establish post-offices from State to State (leaving perhaps, though not intended, the whole interior post-offices in every State to its own regulation), and the postage

to have been under an act of Parliament, in 1710. Dr. Lieber's Encyc. Amer., article *Posts*.

In Mr. Professor Malkin's Introductory Lecture on History, before the London University, in March, 1830, he states (p. 14), "It is understood that in England the first mode adopted for a proper and regular conveyance of letters was in 1642, weekly, and on horseback, to every part of the kingdom. The present improved system by mail-coaches was not introduced until 1782."

¹ There is, in Bioren and Duane's Edition of the Laws of the United States (vol. 1, p. 649, &c.), an account of the post-office establishment, during the Revolution and before the Constitution was adopted. Dr. Franklin was appointed, in July, 1775, the first postmaster-general. The act of 1782 directed that a mail should be carried at least once in every week to and from each stated post-office.

² American Almanac, 1830, p. 217; Dr. Lieber's Encyc. Amer., article *Posts*; ante, vol. iii. p. 24, note.

(a) See article *Post* in New American Cyclopædia.

that could be taken was not allowed to be beyond the actual expenses; thus shutting up the avenue to all improvements. In short, like every other power under the confederation, it perished from a jealousy which required it to live, and yet refused it appropriate nourishment and sustenance.¹

§ 1127. In the first draft of the Constitution, the clause stood thus: "Congress shall have power to establish post-offices." It was subsequently amended by adding the words "and post-roads," by the vote of six States against five; and then, as amended, it passed without opposition.² It is observable, that the confederation gave only the power to establish and regulate *post-offices*; and therefore the amendment introduced a new and substantive power, unknown before in the national government.

§ 1128. Upon the construction of this clause of the Constitution, two opposite opinions have been expressed. One maintains that the power to establish post-offices and post-roads can intend no more than the power to direct where post-offices shall be kept, and on what roads the mails shall be carried.³ (a) Or, as it has, been on other occasions expressed, the power to establish post-roads is a power to designate or point out what roads shall be mail roads, and the right of passage or way along them, when so designated.⁴ The other maintains, that although these modes of exercising the power are perfectly constitutional, yet they are not the whole of the power, and do not exhaust it. On the contrary, the power comprehends the right to make or construct any roads which Congress may deem proper for the conveyance of the mail, and to keep them in due repair for such purpose.

§ 1129. The grounds of the former opinion seem to be as follows: The power given under the confederation never practically

¹ See Sergeant on Const. Introduction, p. 17 (2d edit.).

² Journal of Convention, 220, 256, 257, 261, 357.

³ 4 Elliot's Debates, 279.

⁴ 4 Elliot's Debates, 354; Ibid. 233.

(a) See also the debate in Congress on Internal Improvements, in the year 1824; the several veto messages of President Madison, Mar. 1817; President Monroe, May 4, 1822; and President Jackson, May 27, 1830. Also what is said in the case of *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421. Within

the meaning of the act punishing the stealing of letters from the post-office, that amounts to a post-office which is kept as a place of deposit of mailable matter, though it be merely a desk, or a trunk or box carried about a house or from one building to another. *United States v. Marselis*, 2 Blatch. 108.

received any other construction. Congress never undertook to make any roads, but merely designated those existing roads on which the mail should pass. At the adoption of the Constitution there is not the slightest evidence that a different arrangement, as to the limits of the power, was contemplated. On the contrary, it was treated by the Federalist as a harmless power, and not requiring any comment.¹ The practice of the government, since the adoption of the Constitution, has conformed to this view. The first act passed by Congress, in 1792, is entitled "an act to establish post-offices and post-roads." The first section of this act established many post-offices as well as post-roads. It was continued, amended, and finally repealed, by a series of acts from 1792 to 1810; all of which acts have the same title, and the same provisions declaring certain roads to be post-roads. From all of which it is manifest, that the legislature supposed that they had established post-roads in the sense of the Constitution, when they declared certain roads, then in existence, to be post-roads, and designated the routes along which the mails were to pass. As a further proof upon this subject, the statute-book contains many acts passed at various times, during a period of more than twenty years, discontinuing certain post-roads.² A strong argument is also derivable from the practice of continental Europe, which must be presumed to have been known to the framers of the Constitution. Different nations in Europe have established posts, and for mutual convenience have stipulated a free passage for the posts arriving on their frontiers through their territories. It is probable that the Constitution intended nothing more by this provision than to enable Congress to do by law, without consulting the States, what in Europe can be done only by treaty or compact. It was thought necessary to insert an express provision in the Constitution, enabling the government to exercise jurisdiction over ten miles square for a seat of government, and of such places as should be ceded by the States for forts, arsenals, and other similar purposes. It is incredible that such solicitude should have been expressed for such inconsiderable spots, and yet that, at the same time, the Constitution intended to convey by implication the power to construct roads throughout the whole country, with the consequent right to use the timber and soil, and to exercise jurisdiction over them.

¹ The Federalist, No. 42.

² 4 Elliot's Debates, 354.

It may be said that, unless Congress have the power, the mail roads might be obstructed or discontinued, at the will of the State authorities. But that consequence does not follow; for when a road is declared by law to be a mail road, the United States have a right of way over it; and, until the law is repealed, such an interest in the use of it as that the State authorities could not obstruct it.¹ The terms of the Constitution are perfectly satisfied by this limited construction, and the power of Congress to make whatever roads they may please, in any State, would be a most serious inroad upon the rights and jurisdiction of the States. It never could have been contemplated.²

¹ 4 Elliot's Debates, 354, 355.

² Aware of the difficulties attendant upon this extremely strict construction, another has been attempted, which is more liberal, but which has been thought, as will be hereafter seen, to surrender the substance of the argument. It will be most satisfactory to give it in the very words of its most distinguished advocate:—

“The first of these grants is in the following words: ‘Congress shall have power to establish post-offices and post-roads.’ What is the just import of these words, and the extent of the grant? The word ‘establish’ is the ruling term; post-offices and post-roads are the subjects on which it acts. The question, therefore, is, what power is granted by that word? The sense in which words are commonly used is that in which they are to be understood in all transactions between public bodies and individuals. The intention of the parties is to prevail, and there is no better way of ascertaining it than by giving to the terms used their ordinary import. If we were to ask any number of our most enlightened citizens, who had no connection with public affairs, and whose minds were unprejudiced, what was the import of the word ‘establish,’ and the extent of the grant which it controls, we do not think that there would be any difference of opinion among them. We are satisfied that all of them would answer, that a power was thereby given to Congress to fix on the towns, court-houses, and other places, throughout our Union, at which there should be post-offices; the routes by which the mails should be carried from one post-office to another, so as to diffuse intelligence as extensively, and to make the institution as useful, as possible; to fix the postage to be paid on every letter and packet thus carried, to support the establishment; and to protect the post-offices and mails from robbery, by punishing those who should commit the offence. The idea of a right to lay off the roads of the United States, on a general scale of improvement; to take the soil from the proprietor by force; to establish turn-pikes and tolls, and to punish offenders in the manner stated above, would never occur to any such person. The use of the existing road by the stage, mail-carrier, or post-boy, in passing over it as others do, is all that would be thought of; the jurisdiction and soil remaining to the State, with a right in the State, or those authorized by its legislature, to change the road at pleasure.

“The intention of the parties is supported by other proof, which ought to place it beyond all doubt. In the former act of government (the confederation) we find a grant for the same purpose expressed in the following words: ‘The United States, in Congress assembled, shall have the sole and exclusive right and power of establishing and regulating post-offices from one State to another, throughout the United States, and of exacting such postage on the papers passing through the same as may be requisite to

§ 1130. The grounds upon which the other opinion is maintained, are as follows: This is not a question of implied power; but of express power. We are not now looking to what are prop-

defray the expenses of the said post-office.' The term 'establish' was likewise the ruling one, in that instrument, and was evidently intended and understood to give a power simply and solely to fix where there should be post-offices. By transferring this term from the confederation into the Constitution, it was doubtless intended that it should be understood in the same sense in the latter that it was in the former instrument, and to be applied alike to post-offices and post-roads. In whatever sense it is applied to post-offices, it must be applied in the same sense to post-roads. But it may be asked, if such was the intention, why were not all the other terms of the grant transferred with it? The reason is obvious. The confederation being a bond of union between independent States, it was necessary, in granting the powers which were to be exercised over them, to be very explicit and minute in defining the powers granted. But the Constitution, to the extent of its powers, having incorporated the States into one government, like the government of the States individually, fewer words, in defining the powers granted by it, were not only adequate, but perhaps better adapted to the purpose. We find that brevity is a characteristic of the instrument. Had it been intended to convey a more enlarged power in the Constitution than had been granted in the confederation, surely the same controlling term would not have been used; or other words would have been added to show such intention, and to mark the extent to which the power should be carried. It is a liberal construction of the powers granted in the Constitution, by this term, to include in it all the powers that were granted in the confederation by terms which specifically defined and (as was supposed) extended their limits. It would be absurd to say, that, by omitting from the Constitution any portion of the phraseology which was deemed important in the confederation, the import of that term was enlarged, and with it the powers of the Constitution, in a proportional degree, beyond what they were in the confederation. The right to exact postage and to protect the post-offices and mails from robbery, by punishing the offenders, may fairly be considered as incidents to the grant, since, without it the object of the grant might be defeated. Whatever is absolutely necessary to the accomplishment of the object of the grant, though not specified, may fairly be considered as included in it. Beyond this the doctrine of incidental power cannot be carried.

"If we go back to the origin of our settlements and institutions, and trace their progress down to the revolution, we shall see that it was in this sense, and in none other, that the power was exercised by all our colonial governments. Post-offices were made for the country, and not the country for them. They are the offspring of improvement. They never go before it. Settlements are first made; after which the progress is uniform and simple, extending to objects in regular order, most necessary to the comfort of man; schools, places of public worship, court-houses, and markets; post-offices follow. Roads may, indeed, be said to be coeval with settlements. They lead to all the places mentioned, and to every other which the various and complicated interests of society require.

"It is believed that not one example can be given, from the first settlement of our country to the adoption of this Constitution, of a post-office being established, without a view to existing roads; or of a single road having been made by pavement, turnpike, &c., for the sole purpose of accommodating a post-office. Such, too, is the uniform progress of all societies. In granting, then, this power to the United States, it was, undoubtedly, intended by the framers and ratifiers of the Constitution to convey it in

erly incidents, or means to carry into effect given powers; but are to construe the terms of an express power. The words of the Constitution are, "Congress shall have power to establish post-offices and post-roads." What is the true meaning of these words? There is no such known sense of the word "establish," as to "direct," "designate," or "point out." And if there were, it does not follow, that a special or peculiar sense is to be given to the words, not conformable to their general meaning, unless that sense be required by the context, or, at least, better harmonizes with the subject-matter, and objects of the power, than any other sense. That cannot be pretended in the present case. The received general meanings, if not the only meanings of the word "establish," are, to settle firmly, to confirm, to fix, to form or modify, to found, to build firmly, to erect permanently.¹ And

the sense and extent only in which it had been understood and exercised by the previous authorities of the country.

"This conclusion is confirmed by the object of the grant and the manner of its execution. The object is the transportation of the mail throughout the United States, which may be done on horseback, and was so done, until lately, since the establishment of stages. Between the great towns, and in other places, where the population is dense, stages are preferred, because they afford an additional opportunity to make a profit from passengers. But where the population is sparse, and on cross roads, it is generally carried on horseback. Unconnected with passengers and other objects, it cannot be doubted, that the mail itself may be carried in every part of our Union, with nearly as much economy, and greater despatch, on horseback, than in a stage; and in many parts with much greater. In every part of the Union, in which stages can be preferred, the roads are sufficiently good, provided those which serve for every other purpose will accommodate them. In every other part, where horses alone are used, if other people pass them on horseback, surely the mail-carrier can. For an object so simple and so easy in the execution, it would doubtless excite surprise, if it should be thought proper to appoint commissioners to lay off the country on a great scheme of improvement, with the power to shorten distances, reduce heights, level mountains, and pave surfaces.

"If the United States possessed the power contended for under this grant, might they not, in adopting the roads of the individual States for the carriage of the mail, as has been done, assume jurisdiction over them, and preclude a right to interfere with or alter them? Might they not establish turnpikes, and exercise all the other acts of sovereignty, above stated, over such roads, necessary to protect them from injury, and defray the expense of repairing them? Surely, if the right exists, these consequences necessarily followed, as soon as the road was established. The absurdity of such a pretension must be apparent to all who examine it. In this way, a large portion of the territory of every State might be taken from it; for there is scarcely a road in any State which will not be used for the transportation of the mail. A new field for legislation and internal improvement would thus be opened." President Monroe's Message, of 4th May, 1822, pp. 24 to 27.

¹ Johnson's Dict. *ad verb.*; Webster's Dict. *Id.*

it is no small objection to any construction, that it requires the word to be deflected from its received and usual meaning; and gives it a meaning unknown to, and unacknowledged by, lexicographers. Especially is it objectionable and inadmissible, where the received and common meaning harmonizes with the subject-matter; and if the very end were required, no more exact expression could ordinarily be used. In legislative acts, in state papers, and in the Constitution itself, the word is found with the same general sense now insisted on; that is, in the sense of to create, to form, to make, to construct, to settle, to build up with a view to permanence. Thus, our treaties speak of establishing regulations of trade. Our laws speak of *establishing* navy-hospitals, where land is to be purchased, work done, and buildings erected; of *establishing* trading-houses with the Indians, where houses are to be erected and other things done. The word is constantly used in a like sense in the articles of confederation. The authority is therein given to Congress of *establishing* rules in cases of capture; of *establishing* courts of appeal in cases of capture; and, what is directly in point, of *establishing* and *regulating* post-offices. Now, if the meaning of the word here was simply to point out or designate post-offices, there would have been an end of all further authority, except of regulating the post-offices so designated and pointed out. Under such circumstances, how could it have been possible under that instrument (which declares, that every power not *expressly* delegated shall be retained by the States) to find any authority to carry the mail, or to make contracts for this purpose? much more to prohibit any other persons under penalties from conveying letters, despatches, or other packets from one place to another of the United States? The very first act of the continental congress on this subject was, "for *establishing* a post" (not a post-office); and it directed, "that a line of posts be appointed under the direction of the postmaster-general, from Falmouth, in New England, to Savannah, in Georgia, with as many cross posts as he shall think fit;" and it directs the necessary expenses of the "*establishment*" beyond the revenue to be paid out by the United Colonies.¹ Under this, and other supplementary acts, the establishment continued until October, 1782, when, under the articles of confederation, the establishment was reorganized,

¹ Ordinance of 26th July, 1775; 1 Journal of Congress, 177, 178.

and, instead of a mere appointment and designation of post-offices, provision was made, "that a continued communication of posts throughout the United States shall be *established* and maintained," &c.; and many other regulations were made, wholly incompatible with the narrow construction of the words now contended for.¹

§ 1131. The Constitution itself also uniformly uses the word "established" in the general sense, and never in this peculiar and narrow sense. It speaks in the preamble of one motive being, "to *establish* justice," and that the people do *ordain* and *establish* this Constitution. It gives power to *establish* a uniform rule of naturalization and uniform laws on the subject of bankruptcies. Does not this authorize Congress to make, create, form, and construct laws on these subjects? It declares, that the judicial power shall be vested in one supreme court, and in such inferior courts as Congress may, from time to time, *ordain* and *establish*. Is not a power to *establish* courts a power to create, and make, and regulate them? It declares, that the ratification of nine States shall be sufficient for the *establishment* of this Constitution between the States so ratifying the same.² And in one of the amendments, it provides, that Congress shall make no law respecting an *establishment* of religion. It is plain, that to construe the word in any of these cases, as equivalent to *designate* or *point out*, would be absolutely absurd. The clear import of the word is, to create, and form, and fix in a settled manner. Referring it to the subject-matter, the sense in no instance can be mistaken. To establish courts is to create, and form, and regulate them. To establish rules of naturalization is to frame and confirm such rules. To establish laws on the subject of bankruptcies, is to frame, fix, and pass them. To establish the Constitution is to make, and fix, and erect it, as a permanent form of government. In the same manner, to establish post-offices, and post-roads, is to frame and pass laws, to erect, make, form, regulate, and preserve them. Whatever is necessary, whatever is appropriate to this purpose, is within the power.

§ 1132. Besides; upon this narrow construction, what be-

¹ Ordinance, 18th Oct. 1782; 1 U. S. Laws (Bioren & Duane), 651; 7 Journ. of Congress, 503.

² See 4 Elliot's Debates, 356.

comes of the power itself? If the power be to *point out or designate post-offices*, then it supposes that there already exist some offices out of which a designation can be made. It supposes a power to select among things of the same nature. Now, if an office does not already exist at the place, how can it be designated as a post-office? If you cannot create a post-office, you can do no more than mark out one already existing. In short, these rules of strict construction might be pressed still further; and, as the power is only given to designate, not offices, but post-offices, the latter must be already in existence; for otherwise the power must be read, to designate what offices shall be used as post-offices, or at what places post-offices shall be recognized; either of which is a departure from the supposed literal interpretation.

§ 1133. In the next place, let us see, what upon this narrow interpretation becomes of the power in another aspect. It is to establish post-offices. Now, the argument supposes, that this does not authorize the purchase or erection of a building for an office; but it does necessarily suppose the authority to erect or create an office; to regulate the duties of the officer; and to fix a place (*officina*) where his business is to be performed. It then unavoidably includes, not merely a power to designate, but a power to create the thing intended, and to do all other acts to make the thing effectual; that is, to create the whole system appropriate to a post-office establishment. Now, this involves a plain departure from the very ground of the argument. It is no longer a power to designate a thing, or mark out a route; but it is a power to create, and fix every other thing necessary and appropriate to post-offices. The argument, therefore, resorts to implications in order to escape from its own narrow interpretation, and the very power to designate becomes a power to create offices, and frame systems, and institute penalties, and raise revenue, and make contracts. It becomes, in fact, the very thing, which the other argument supposes to be the natural sense, namely, the power to erect and maintain a post-office establishment.

§ 1134. Under any other interpretation, the power itself would become a mere nullity. If resort be had to a very strict and critical examination of the words, the power "to establish post-offices" imports no more than the power to create the offices

intended; that done, the power is exhausted, and the words are satisfied. The power to create the office does not necessarily include the power to carry the mail, or regulate the conveyance of letters, or employ carriers. The one may exist independently of the other. A State might without absurdity possess the right to carry the mail, while the United States might possess the right to designate the post-offices at which it should be opened, and provide the proper officers; or the converse powers might belong to each. It would not be impracticable, though it would be extremely inconvenient and embarrassing. Yet, no man ever imagined such a construction to be justifiable. And why not? Plainly because constitutions of government are not instruments to be scrutinized, and weighed upon metaphysical or grammatical niceties. They do not turn upon ingenious subtleties; but are adapted to the business and exigencies of human society; and the powers given are understood in a large sense, in order to secure the public interests. Common-sense becomes the guide, and prevents men from dealing with mere logical abstractions. Under the confederation, this very power to establish post-offices was construed to include the other powers already named, and others far more remote. It never entered into the heads of the wise men of those days, that they possessed a power to create post-offices, without the power to create all the other things necessary to make post-offices of some human use. They did not dream of post offices without posts, or mails, or routes, or carriers. It would have been worse than a mockery. Under the confederation, with the strict limitation of powers which that instrument conferred, they put into operation a large system for the appropriate purposes of a post-office establishment.¹ No man ever doubted, or denied the constitutionality of this exercise of the power. It was largely construed to meet the obvious intent for which it was delegated. The words of the Constitution are more extensive than those of the confederation. In the latter, the words to establish "*post-roads*" are not to be found. These words were certainly added for some purpose. And if any, for what other purpose than to enable Congress to lay out and make roads?²

§ 1135. Under the Constitution, Congress has, without any questioning, given a liberal construction to the power to estab-

¹ See Act of 18th of October, 1782.

² 4 Elliot's Debates, 356.

lish post-offices and post-roads. It has been truly said, that in a strict sense, "this power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road from one post-office to another. And from this implied power, has been again inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and a post-road. This right is indeed essential to the beneficial exercise of the power; but not indispensably necessary to its existence."¹

§ 1136. The whole practical course of the government upon this subject from its first organization down to the present time, under every administration, has repudiated the strict and narrow construction of the words above mentioned.² The power to establish post-offices and post-roads has never been understood to include ~~no~~ more than the power to point out and designate post-offices and post-roads. Resort has been constantly had to the more expanded sense of the word "establish;" and no other sense can include the objects which the post-office laws have constantly included. Nay, it is not only not true, that these laws have stopped short of an exposition of the words sufficiently broad to justify the making of roads; but they have included exercises of power far more remote from the immediate objects. If the practice of the government is, therefore, of any weight in giving a constitutional interpretation, it is in favor of the liberal interpretation of the clause.

§ 1137. The fact, if true, that Congress have not hitherto made any roads for the carrying of the mail, would not affect the right or touch the question. It is not doubted that the power is properly carried into effect by making certain State roads post-roads. When Congress found those roads suited to the purpose, there could be no constitutional reason for refusing to establish them as mail-routes. The exercise of authority was clearly within the scope of the power. But the argument would have it, that because this exercise of the power, clearly within its

¹ McCullough v. Maryland, 4 Wheat. R. 416, 417.

² See the laws referred to in Postmaster-General v. Early, 12 Wheat. R. 136, 144, 145.

scope, has been hitherto restrained to making existing roads post-roads, therefore Congress cannot proceed constitutionally to make a post-road where no road now exists. This is clearly what lawyers call a *non sequitur*. It might with just as much propriety be urged, that, because Congress had not hitherto used a particular means to execute any other given power, therefore it could not now do it. If, for instance, Congress had never provided a ship for the navy except by purchase, they could not now authorize ships to be built for a navy, or *e converso*. If they had not laid a tax on certain goods, it could not now be done. If they had never erected a custom-house, or a court-house, they could not now do it. Such a mode of reasoning would be deemed by all persons wholly indefensible.

§ 1138. But it is not admitted that Congress have not exercised this very power, with reference to this very object. By the act of 21st of April, 1806 (ch. 41), the President was authorized to cause to be opened a road from the frontier of Georgia on the route from Athens to New Orleans; and to cause to be opened a road or roads through the territory, then lately ceded by the Indians to the United States, from the river Mississippi to the Ohio, and to the former Indian boundary line, which was established by the treaty of Greenville; and to cause to be opened a road from Nashville, in the State of Tennessee, to Natchez, in the Mississippi Territory. The same remark applies to the Act of 29th of March, 1806 (ch. 19), "to regulate the laying out and making a road from Cumberland, in the State of Maryland, to the State of Ohio." Both of these acts were passed in the administration of President Jefferson, who, it is well known, on other occasions maintained a strict construction of the Constitution.^(a)

§ 1139. But, passing by considerations of this nature, why does not the power to establish post-offices and post-roads include the power to make and construct them, when wanted, as well as the power to establish a navy hospital or a custom-house a power to make and construct them? The latter is not doubted by any

(a) But it was a bill for this very road that Mr. Monroe vetoed, and his veto with the vetoes of Presidents Madison and Jackson, referred to in note to § 1128, and the failure of Congress to pass the vetoed bills over them, are said by Mr. Benton to have killed the system of In-

ternal Improvements by the general government. Benton's Thirty Years' View, II. 167. The Cumberland road, which cost the government \$6,670,000, was finally abandoned to the States in which it was constructed, and is now merely a common highway. C.

persons; why, then, is the former? In each case, the sense of the ruling term "establish" would seem to be the same; in each, the power may be carried into effect by means short of constructing or purchasing the things authorized. A temporary use of a suitable site or buildings may possibly be obtained, with or without hire. Besides, why may not Congress purchase or erect a post-office building, and buy the necessary land, if it be, in their judgment, advisable? Can there be a just doubt, that a power to establish post-offices includes this power, just as much as a power to establish custom-houses would to build the latter? Would it not be a strange construction to say, that the abstract office might be created, but not the *officina*, or place, where it could be exercised? There are many places peculiarly fit for local post-offices, where no suitable building might be found. And, if a power to construct post-office buildings exists, where is the restraint upon constructing roads?

§ 1140. It is said, that there is no reason why Congress should be invested with such a power, seeing that the State roads may and will furnish convenient routes for the mail. When the State roads do furnish such routes, there can certainly be no sound policy in Congress making other routes. But there is a great difference between the policy of exercising a power and the right of exercising it. But, suppose the State roads do not furnish (as in point of fact they did not at the time of the adoption of the Constitution, and as hereafter, for many exigencies of the government in times of war and otherwise, they may not) suitable routes for the mails, what is then to be done? Is the power of the general government to be paralyzed? Suppose a mail road is out of repair and foundering, cannot Congress authorize the repair of it? If they can, why then not make it originally? Is the one more a means to an end than the other? If not, then the power to carry the mails may be obstructed, nay, may be annihilated, by the neglect of a State.¹ Could it have been the intention of the Constitution, in the exercise of this most vital power, to make it dependent upon the will or the pleasure of the States?

§ 1141. It has been said, that when once a State road is made a post-road by an act of Congress, the national government have acquired such an interest in the use of it, that it is not compe-

¹ 4 Elliot's Debates, 356.

tent for the State authorities to obstruct it. But how can this be made out? If the power of Congress is merely to select or designate the mail-roads, what interest in the use is acquired by the national government any more than by any travellers upon the road? Where is the power given to acquire it? Can it be pretended, that a State may not discontinue a road after it has been once established as a mail road? The power has been constantly exercised by the States, ever since the adoption of the Constitution. The States have altered, and discontinued, and changed such roads at their pleasure. It would be a most truly alarming inroad upon State sovereignty to declare that a State road could never be altered or discontinued after it had once become a mail road. That would be to supersede all State authority over their own roads. If the States can discontinue their roads, why not obstruct them? Who shall compel them to repair them when discontinued, or keep them at any time in good repair? No one ever yet contended that the national government possessed any such compulsive authority. If, then, the States may alter or discontinue their roads, or suffer them to go out of repair, is it not obvious that the power to carry the mails may be retarded or defeated in a great measure by this constitutional exercise of State power? And, if it be the right and duty of Congress to provide adequate means for the transportation of the mails wherever the public good requires it, what limit is there to these means, other than that they are appropriate to the end?¹

§ 1142. In point of fact, Congress cannot be said, in any exact sense, to have yet executed the power to establish post-roads, if by that power we are to understand the designation of particular State roads on which the mail shall be carried. The general course has been to designate merely the towns between which the mails shall be carried, without ascertaining the particular roads at all. Thus, the Act of 20th of February, 1792, ch. 7 (which is but a sample of the other acts), declares, that "the following roads be established as post-roads, namely, from Wiscasset in the District of Maine to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester," &c.; without pointing out any road between those places, on which it should be carried.

¹ 4 Elliot's Debates, 356.

There are different roads from several of these places to the others. Suppose one of these roads should be discontinued, could the mail carriers insist upon travelling it?

§ 1143. The truth is, that Congress have hitherto acted under the power to a very limited extent only; and will forever continue to do so from principles of public policy and economy, except in cases of an extraordinary nature. There can be no motive to use the power, except for the public good; and circumstances may render it indispensable to carry it out in particular cases to its full limits. It has already occurred, and may hereafter occur, that post-roads may be important and necessary for the purpose of the Union, in peace as well as in war, between places where there is not any good State road, and where the amount of travel would not justify any State in an expenditure equal to the construction of such a State road.¹ In such cases, as the benefit is for the Union, the burden ought to be borne by the Union. Without any invidious distinction, it may be stated, that the winter mail route between Philadelphia and Baltimore and Washington, by the way of the Susquehanna and Havre de Grace, has been before Congress under this very aspect. There is no one who will doubt the importance of the best post-road in that direction (the nearest between the two cities); and yet it is obvious, that the nation alone can be justly called upon to provide the road.

§ 1144. Let a case be taken, when State policy or State hostility shall lead the legislature to close up, or discontinue a road, the nearest and the best between two great States, rivals perhaps for the trade and intercourse of a third State; shall it be said, that Congress has no right to make or repair a road for keeping open for the mail the best means of communication between those States? May the national government be compelled to take the most inconvenient and indirect routes for the mail?² In other words, have the States a power to say, how, and upon what roads the mails shall and shall not travel? If so, then, in relation to post-roads, the States, and not the Union, are supreme.

§ 1145. But it is said, that it would be dangerous to allow any power in the Union to lay out and construct post-roads; for then

¹ See Rawle on the Constitution, ch. 9, pp. 103, 104.

² 4 Elliot's Debates, 356.

the exercise of the power would supersede the State jurisdiction. This is an utter mistake. If Congress should lay out and construct a post-road in a State, it would still be a road within the ordinary territorial jurisdiction of the State. The State could not, indeed, supersede, or obstruct, or discontinue it, or prevent the Union from repairing it, or the mails from travelling on it. But subject to these incidental rights, the right of territory and jurisdiction, civilly and criminally, would be complete and perfect in the State. The power of Congress over the road would be limited to the mere right of passage and preservation. That of the State would be general, and embrace all other objects. Congress undoubtedly has power to purchase lands in a State for any public purposes, such as forts, arsenals, and dock-yards. So, they have a right to erect hospitals, custom-houses, and court-houses in a State. But no person ever imagined, that these places were thereby removed from the general jurisdiction of the State. On the contrary, they are universally understood, for all other purposes, not inconsistent with the constitutional rights and uses of the Union, to be subject to State authority and rights.

§ 1146. The clause respecting cessions of territory for the seat of government, and for forts, arsenals, dock-yards, &c., has nothing to do with the point. But if it had, it is favorable to the power. That clause was necessary for the purpose of ousting the State jurisdiction in the specified cases, and for vesting an *exclusive* jurisdiction in the general government. No general or *exclusive* jurisdiction is either required, or would be useful in regard to post-roads. It would be inconvenient for Congress to assemble in a place where it had not exclusive jurisdiction. And an exclusive jurisdiction would seem indispensable over forts, arsenals, dock-yards, and other places of a like nature. But surely it will not be pretended, that Congress could not erect a fort, or magazine, in a place within a State, unless the State should cede the territory. The only effect would be, that the jurisdiction in such a case would not be exclusive. Suppose a State should prohibit a sale of any of the lands within its boundaries by its own citizens, for any public purposes indispensable for the Union, either military or civil, would not Congress possess a constitutional right to demand and appropriate land within the State for such purposes, making a just compensation?

Exclusive jurisdiction over a road is one thing; the right to make it is quite another. A turnpike company may be authorized to make a road; and yet may have no jurisdiction, or at least no exclusive jurisdiction over it.

§ 1147. The supposed silence of the Federalist¹ proves nothing. That work was principally designed to meet objections, and remove prejudices. The post-office establishment, in its nature, and character, and purposes, was so generally deemed useful, and convenient, and unexceptionable, that it was wholly unnecessary to expound its value, or enlarge upon its benefits.

§ 1148. Such is a summary of the principal reasoning on each side of this much contested question. The reader must decide for himself upon the preponderance of the argument.

§ 1149. This question, as to the right to lay out and construct post-roads, is wholly distinct from that of the more general power to lay out and make canals, and military and other roads. The latter power may not exist at all, even if the former should be unquestionable. The latter turns upon a question of implied power, as incident to given powers.² The former turns upon the true interpretation of words of express grant. Nobody doubts, that the words "establish post-roads," may, without violating their received meaning in other cases, be construed so as to include the power to lay out and construct roads. The question is, whether that is the true sense of the words, as used in the Constitution. And here, if ever, the rule of interpretation, which requires us to look at the nature of the instrument, and the objects of the power, as a national power, in order to expound its meaning, must come into operation.

§ 1150. But whatever be the extent of the power, narrow or large, there will still remain another inquiry, whether it is an exclusive power, or concurrent in the States. This is not, perhaps, a very important inquiry, because it is admitted on all sides, that it can be exercised only in subordination to the power of Congress, if it be concurrent in the States. A learned commentator deems it concurrent, inasmuch as there seems nothing in the Constitution, or in the nature of the thing itself, which may not be exercised by both governments at the same time, without prejudice or interference; but subordinate, because,

¹ No. 42.

² See Rawle on the Constitution, ch. 9, p. 104.

whenever any power is expressly granted to Congress, it is to be taken for granted, that it is not to be contravened by the authority of any particular State. A State might, therefore, establish a post-road, or post-office, on any route, where Congress had not established any.¹ On the other hand, another learned commentator is of opinion, that the power is exclusive in Congress, so far as relates to the conveyance of letters, &c.² It is highly improbable, that any State will attempt any exercise of the power, considering the difficulty of carrying it into effect, without the co-operation of Congress.

¹ Tuck. Black. Comm. App. 265.

² Rawle on the Constitution, ch. 9, pp. 103, 104.

CHAPTER XIX.

POWER TO PROMOTE SCIENCE AND USEFUL ARTS.

§ 1151. THE next power of Congress is, “to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”

§ 1152. This power did not exist under the confederation; and its utility does not seem to have been questioned. The copyright of authors in their works had, before the revolution, been decided in Great Britain to be a common-law right; and it was regulated and limited under statutes passed by Parliament upon that subject.¹ The right to useful inventions seems, with equal reason, to belong to the inventors; and, accordingly, it was saved out of the statute of monopolies in the reign of King James the First, and has ever since been allowed for a limited period, not exceeding fourteen years.² It was doubtless to this knowledge of the common law and statutable rights of authors and inventors, that we are to attribute this constitutional provision.³ It was beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise they would have been subjected to the varying laws and systems of the different States on this subject, which would impair, and might even destroy the value of their rights; to the public, as it would promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint. In short, the only boon which could be offered to inventors to disclose the secrets of their discoveries, would be the exclusive right and profit of them, as a monopoly, for a lim-

¹ 2 Black. Comm. 406, 407, and Christian's note (5); 4 Burr. R. 2303; Rawle on Const. ch. 9, pp. 105, 106; 2 Kent's Comm. Lect. 36, pp. 306, 307, 314, 315.

² 2 Black. Comm. 407, and Christian's note (8); 4 Black. Comm. 159; 2 Kent's Comm. Lect. 36, pp. 299 to 306.

³ The Federalist, No. 43.

ited period. And authors would have little inducement to prepare elaborate works for the public, if their publication was to be at a large expense, and, as soon as they were published, there would be an unlimited right of depredation and piracy of their copyright. The States could not separately make effectual provision for either of the cases;¹ and most of them, at the time of the adoption of the Constitution, had anticipated the propriety of such a grant of power, by passing laws on the subject at the instance of the continental Congress.²

§ 1153. The power, in its terms, is confined to authors and inventors; and cannot be extended to the introducers of any new works or inventions. This has been thought by some persons of high distinction to be a defect in the Constitution.³ But perhaps the policy of further extending the right is questionable; and, at all events, the restriction has not hitherto operated as any discouragement of science or the arts. It has been doubted whether Congress has authority to decide the fact, that a person is an author or inventor in the sense of the Constitution, so as to preclude that question from judicial inquiry. But, at all events, such a construction ought never to be put upon the terms of any general act in favor of a particular inventor, unless it be inevitable.⁴

§ 1154. It has been suggested, that this power is not exclusive, but concurrent with that of the States, so, always, that the acts of the latter do not contravene the acts of Congress.⁵ It has, therefore, been asserted, that where Congress go no further than to secure the right to an author or inventor, the State may regulate the use of such right, or restrain it, so far as it may deem it injurious to the public. Whether this be so or not, may be matter for grave inquiry whenever the question shall arise directly in judgment. At present it seems wholly unnecessary to discuss it theoretically. But, at any rate, there does not seem to be the same difficulty in affirming, that, as the power of Congress extends only to authors and inventors, a State may grant

¹ 2 Kent's Comm. Lect. 36, pp. 298, 299.

² The Federalist, No. 43. See also 1 Tuck. Black. Comm. App. 265, 266; Rawle on Const. ch. 9, pp. 105, 106. See Hamilton's Report on Manufactures, § 8, p. 235, &c.

³ Hamilton's Rep. on Manufactures, § 8, pp. 235, 236.

⁴ Evans v. Eaton, 3 Wheat. R. 454, 513.

⁵ 1 Tuck. Black. Comm. App. 265, 266; Livingston v. Van Ingen, 9 Johns. R. 507.

an exclusive right to the possessor or introducer of an art or invention, who does not claim to be an inventor, but has merely introduced it from abroad.¹

§ 1155. In the first draft of the Constitution the clause is not to be found; but the subject was referred to a committee (among other propositions), whose report was accepted, and gave the clause in the very form in which it now stands in the Constitution.² A more extensive proposition “to establish public institutions, rewards, and immunities for the promotion of agriculture, commerce, and manufactures,” was, as has been before stated, made, and silently abandoned.³ (a) Congress have already, by a series of laws on this subject, provided for the rights of authors and inventors; and, without question, the exercise of the power has operated as an encouragement to native genius, and to the solid advancement of literature and the arts.

§ 1156. The next power of Congress is “to constitute tribunals inferior to the supreme court.” This clause properly belongs to the third article of the Constitution; and will come in review when we survey the constitution and powers of the judicial department. It will therefore be, for the present, passed over.

¹ *Livingston v. Van Ingen*, 9 Johns. R. 507; *Sergeant on Const.* ch. 28 [ch. 30].

² *Journal of Convention*, 260, 327, 328, 329.

³ *Journal of Convention*, 261.

(a) The power of Congress to legislate on the subject of patents is plenary. *McClurg v. Kingsland*, 1 How. 202; s. c. 17 Pet. 228. It may make special grants: *Bloomer v. Stolley*, 5 McLean, 158; and special extensions: *Blanchard's Factory v. Warner*, 1 Blatch. 258; *Evans v. Eaton*, Pet. C. C. 322. It may give its grants a retrospective effect. *Blanchard v. Sprague*, 2 Story, 164; *McClurg v. Kingsland*, *supra*. But the intention to do so will

not be presumed. *Blanchard v. Sprague*, 3 Sum. 535.

The patent laws can have no effect in a foreign country; and the use upon a foreign vessel, in an American port, of an improvement patented here is not an infringement of the patent, provided it was placed upon her in a foreign port, and was authorized by the laws of the country to which she belongs. *Brown v. Duchesne*, 2 Curt. 371, and 19 How. 183.

CHAPTER XX.

POWER TO PUNISH PIRACIES AND FELONIES.

§ 1157. THE next power of Congress is "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."

§ 1158. By the confederation, the sole and exclusive power was given to Congress "of appointing courts for the trial of piracies and felonies committed on the high seas."¹ But there was no power expressly given to define and punish piracies and felonies.² Congress, however, proceeded to pass an ordinance for the erection of a court for such trials, and prescribed the punishment of death upon conviction of the offence.³ But they never undertook to define what piracies or felonies were. It was taken for granted, that these were sufficiently known and understood at the common law; and that resort might, in all such cases, be had to that law, as the recognized jurisprudence of the Union.⁴

§ 1159. If the clause of the Constitution had been confined to piracies, there would not have been any necessity of conferring the power to define the crime, since the power to punish would necessarily be held to include the power of ascertaining and fixing the definition of the crime. Indeed, there would not seem to be the slightest reason to define the crime at all; for piracy is perfectly well-known and understood in the law of nations, though it is often found defined in mere municipal codes.⁵ By the law of nations, robbery or forcible depredation upon the sea, *animo*

¹ Art. 9.

² The Federalist, No. 42; 5 Wheat. R. App. 16.

³ See Ordinance for trial of piracies and felonies, 5th April, 1781; 7 Journ. Cong. 76.

⁴ A motion was made in Congress to amend the articles of confederation, by inserting in lieu of the words as they stand in the instrument, the following, "declaring what acts committed on the high seas shall be deemed piracies and felonies." It was negatived by the vote of nine States against two. The reason, probably, was the extreme reluctance of Congress to admit any amendment after the project had been submitted to the States. 1 Secret Journals of Congress, 384, June 25, 1778. Mr. Marshall's Speech, 5 Wheat. R. 16, Appx.

⁵ The Federalist, No. 42; Rawle on Const. ch. 9, p. 107; 2 Elliot's Deb. 389, 390.

furandi, is piracy. The common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the universal law of nations; a pirate being deemed an enemy of the human race.¹ The common law, therefore, deems piracy to be robbery on the sea; that is, the same crime which it denominates robbery when committed on land.² And if Congress had simply declared, that piracy should be punished with death, the crime would have been sufficiently defined. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term; for that is certain, which, by reference, is made certain. If Congress should declare murder a felony, nobody would doubt what was intended by murder. And, indeed, if Congress should proceed to declare, that homicide "with malice aforethought" should be deemed murder and a felony, there would still be the same necessity of ascertaining, from the common law, what constituted malice aforethought; so that there would be no end to difficulties or definitions; for each successive definition might involve some terms which would still require some new explanation. But the true intent of the Constitution in this part, was, not merely to define piracy, as known to the law of nations, but to enumerate what crimes in the national code should be deemed piracies. And so the power has been practically expounded by Congress.³

§ 1160. But the power is not merely to define and punish piracies, but *felonies*, and *offences against the law of nations*; and, on this account, the power to define, as well as to punish, is peculiarly appropriate. It has been remarked, that felony is a term of loose signification, even in the common law; and of various import in the statute law of England.⁴ Mr. Justice Blackstone says that felony, in the general acceptation of the English law, comprises every species of crime which occasioned, at common law, the forfeiture of lands or goods. This most frequently

¹ 4 Black. Comm. 71 to 73.

² Mr. East says, "The offence of piracy, by the common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there." 2 East, P. C. 796. In giving this definition he has done no more than follow the language of preceding writers on the common law. 4 Black. Comm. 71 to 73.

³ United States v. Smith, 5 Wheat. R. 153, 158 to 163.

⁴ The Federalist, No. 42; 2 Elliot's Deb. 389, 390.

happens in those crimes for which a capital punishment either is or was liable to be inflicted. All offences, now capital by the English law, are felonies; but there are still some offences, not capital, which are yet felonies (such as suicide, petty larceny, and homicide by chance-medley);¹ that is, they subject the committers of them to some forfeiture, either of lands or goods.² But the idea of capital punishment has now become so associated, in the English law, with the idea of felony, that if an act of Parliament makes a new offence felony, the law implies that it shall be punished with death as well as with forfeiture.³

§ 1161. Lord Coke has given a somewhat different account of the meaning of felony; for he says, "*ex vi termini significat quodlibet capitale crimen felleo animo perpetratum*;" (that is, it signifies every capital offence committed with a felonious intent); "in which sense murder is said to be done *per feloniam*, and is so appropriated by law as that *felonice* cannot be expressed by any other word."⁴ This has been treated as a fanciful derivation, and not as correct as that of Mr. Justice Blackstone, who has followed out that of Spelman.⁵

§ 1162. But whatever may be the true import of the word "felony" at the common law with reference to municipal offences, in relation to offences on the high seas its meaning is necessarily somewhat indeterminate; since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law.⁶ Lord Coke long ago stated, that a pardon of felonies would not pardon piracy, for "piracy, or robbery on the high seas, was no felony whereof the common law took any knowledge, &c.; but was only punishable by the civil law, &c.; the attainder by which law wrought no forfeiture of lands or corruption of blood."⁷ And he added, that the statute of 28 Henry 8, ch. 15, which created the high commission court, for the trial of "all treasons, felonies, robberies, murders, and confederacies, committed in or upon the high sea," &c., did not alter the offence, or make the offence felony, but left the offence as it was before the act, viz. felony only by civil law.⁸

¹ Co. Litt. 391.

² 4 Black. Comm. 93 to 98.

³ 4 Black. Comm. 98. See also 1 Hawk. P. C. ch. 37 (Curwood's edit. ch. 7).

⁴ Co. Litt. 391; 1 Hawk. P. C. ch. 37.

⁵ See 1 Curwood's Hawk. P. C. ch. 7, note, p. 71.

⁶ United States v. Smith, 5 Wheat. R. 153, 159.

⁷ 3 Inst. 112.

⁸ 3 Inst. 112; Co. Litt. 391, a.

§ 1163. Offences against the law of nations are quite as important, and cannot with any accuracy be said to be completely ascertained and defined, in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas, as to offences against the law of nations, there is a peculiar fitness in giving to Congress the power to define, as well as to punish. And there is not the slightest reason to doubt, that this consideration had very great weight with the convention, in producing the phraseology of the clause.¹ On either subject it would have been inconvenient, if not impracticable, to have referred to the codes of the States as well from their imperfection as their different enumeration of the offences. Certainty, as well as uniformity, required that the power to define and punish should reach over the whole of these classes of offences.²

§ 1164. What is the meaning of "high seas," within the intent of this clause, does not seem to admit of any serious doubt. The phrase embraces not only the waters of the ocean, which are out of sight of land, but the waters on the sea-coast, below low-water mark, whether within the territorial boundaries of a foreign nation or of a domestic State.³ Mr. Justice Blackstone has remarked, that the *main sea* or high sea begins at the low-water mark. But between the high-water and the low-water mark, where the tide ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction, one upon the water, when it is full sea, the other upon the land, when it is an ebb.⁴ He doubtless here refers to the waters of the ocean on the sea-coast, and not on creeks and inlets. Lord Hale says that the sea is either that which lies within the body of the county or without. That which lies without the body of a county is called the main sea, or ocean.⁵ So far, then, as regards the States of the Union, "high seas" may be taken to mean that part of the ocean which washes the sea-coast, and is without the body of any county, according to the common law; and, so far as regards

¹ United States v. Smith, 5 Wheat. R. 153, 159.

² The Federalist, No. 42; Sergeant on Const. ch. 28 (ch. 30); Rawle on Const. ch. 9, p. 107.

³ United States v. Pirates, 5 Wheat. R. 184, 200, 204, 206; United States v. Wiltberger, 5 Wheat. R. 76, 94.

⁴ 1 Black. Comm. 110; Constable's case, 5 Co. R. 106; 3 Inst. 113; 2 East's P. C. 802, 803.

⁵ Hale in Harg. Law Tracts, ch. 4, p. 10; 1 Hale, P. C. 423, 424.

foreign nations, any waters on their sea-coast, below low-water mark.¹

§ 1165. Upon the propriety of granting this power to the national government, there does not seem to have been any controversy; or, if any, none of a serious nature. It is obvious, that this power has an intimate connection and relation with the power to regulate commerce and intercourse with foreign nations, and the rights and duties of the national government in peace and war, arising out of the law of nations. As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens, in regard to foreign nations, Congress ought to possess the power to define and punish all such offences, which may interrupt our intercourse and harmony with, and our duties to them.²

§ 1166. Whether this power, so far as it concerns the law of nations, is an exclusive one, has been doubted by a learned commentator.³ As, up to the present time, that question may be deemed for most purposes to be a mere speculative question, it is not proposed to discuss it, since it may be better reasoned out when it shall require judicial decision.

§ 1167. The clause, as it was originally reported in the first draft of the Constitution, was in substance, though not in language, as it now stands. It was subsequently amended, and, in the second draft, stood in its present terms.⁴ There is, however, in the supplement to the Journal, an obscure statement of a question put, to strike out the word "punish," seeming to refer to this clause, which was carried in the affirmative, by a vote of six States against five.⁵ Yet the Constitution itself bears testimony that it did not prevail.

¹ See Rawle on the Const. ch. 9, p. 107; Sergeant on the Const. ch. 28 [ch. 30]; 1 Kent's Comm. Lect. 17, p. 342, &c.; United States v. Grush, 5 Mason's R. 290.

² See 1 Tuck. Black. Comm. App. 268, 269; Rawle on Const. ch. 9, p. 108.

³ Rawle on Const. ch. 9, p. 108.

⁴ Journal of Convention, 221, 257 to 259, 357.

⁵ Journal of Convention, 375, 376.

CHAPTER XXI.

THE POWER TO DECLARE WAR AND MAKE CAPTURES.

§ 1168. THE next power of Congress is to “declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.”

§ 1169. A similar exclusive power was given to Congress by the confederation.¹ That such a power ought to exist in the national government, no one will deny, who believes that it ought to have any powers whatsoever, either for offence or defence, for the common good, or for the common protection. It is, therefore, wholly superfluous to reason out the propriety of granting the power.² It is self-evident, unless the national government is to be a mere mockery and shadow. The power could not be left without extreme mischief, if not absolute ruin, to the separate authority of the several States; for then it would be at the option of any one to involve the whole in the calamities and burdens of warfare.³ In the general government it is safe, because there it can be declared only by the majority of the States.

§ 1170. The only practical question upon this subject would seem to be, to what department of the national government it would be most wise and safe to confide this high prerogative, emphatically called the last resort of sovereigns, *ultima ratio regum*. In Great Britain it is the exclusive prerogative of the crown;⁴ and in other countries, it is usually, if not universally, confided to the executive department. It might by the Constitution have been confided to the executive, or to the senate, or to both conjointly.

§ 1171. In the plan offered by an eminent statesman in the convention, it was proposed, that the senate should have the

¹ Art. 9; The Federalist, No. 41.

² See The Federalist, Nos. 23, 41.

³ 1 Tuck. Black. Comm. App. 271.

⁴ 1 Black. Comm. 257, 258.

sole power of declaring war.¹ The reasons which may be urged in favor of such an arrangement are, that the senate would be composed of representatives of the States, of great weight, sagacity, and experience, and that being a small and select body, promptitude of action, as well as wisdom and firmness, would, as they ought, accompany the possession of the power. Large bodies necessarily move slowly; and where the co-operation of different bodies is required, the retardation of any measure must be proportionally increased. In the ordinary course of legislation this may be no inconvenience. But in the exercise of such a prerogative as declaring war, despatch, secrecy, and vigor are often indispensable, and always useful towards success. On the other hand, it may be urged in reply, that the power of declaring war is not only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow wherever a successful commander will lead; and in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger that war will find it both imbecile in defence, and eager for contest. Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace. The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its propriety and necessity. The executive is to carry it on, and therefore should be consulted as to its time, and the ways and means of making it effective. The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others. Indeed, there might be a propriety

¹ Mr. Hamilton's Plan, Journal of Convention, p. 131.

even in enforcing still greater restrictions, as by requiring a concurrence of two-thirds of both houses.¹

§ 1172. This reasoning appears to have had great weight with the convention, and to have decided its choice. Its judgment has hitherto obtained the unqualified approbation of the country.²

§ 1173. In the convention, in the first draft of the Constitution, the power was given merely "to make war." It was subsequently, and not without some struggle, altered to its present form.³ It was proposed to add the power "to make peace;" but this was unanimously rejected;⁴ upon the plain ground, that it more properly belonged to the treaty-making power. The experience of Congress, under the confederation, of the difficulties attendant upon vesting the treaty-making power in a large legislative body, was too deeply felt to justify the hazard of another experiment.⁵

§ 1174. The power to declare war may be exercised by Congress, not only by authorizing general hostilities, in which case the general laws of war apply to our situation; or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed.⁶ The former course was resorted to in our war with Great Britain in 1812, in which Congress enacted, "that war be, and hereby is declared to exist, between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories."⁷ (a) The latter course was pursued in the qualified war of 1798 with France, which was regulated by divers acts of Congress, and of course was confined to the limits prescribed by those acts.⁸

¹ Several of the States proposed an amendment to the Constitution to this effect. But it was never adopted by a majority. 1 Tuck. Black. Comm. App. 271, 272, 374. Under the confederation, the assent of nine States was necessary to a declaration of war (Art. 9).

² 1 Tuck. Black. Comm. App. 269 to 272; Rawle on the Const. ch. 9, p. 109.

³ Journal of Convention, 221, 258, 259, 327, 328.

⁴ Id. 259.

⁵ The Federalist, No. 64. See also Rawle on the Const. ch. 9, p. 110; North Amer. Rev. Oct. 1827, p. 263.

⁶ Talbot v. Seeman, 1 Cranch's R. 1, 28; Bas v. Tingey, 4 Dall. 37.

⁷ Act of 1812, ch. 102.

⁸ Rawle on the Const. ch. 9, p. 109; Sergeant on Const. ch. 28 [ch. 30]; Bas v. Tingey, 4 Dall. R. 37.

(a) So in the case of the war of 1846 with Mexico, Congress took the ground that certain acts of that republic were

acts of hostility, and the declaration of war assumed that war already existed by the act of Mexico.

§ 1175. The power to declare war would of itself carry the incidental power to grant letters of marque and reprisal, and make rules concerning captures. It is most probable, that an extreme solicitude to follow out the powers enumerated in the confederation occasioned the introduction of these clauses into the Constitution. In the former instrument, where all powers, not *expressly* delegated, were prohibited, this enumeration was peculiarly appropriate. But in the latter, where incidental powers were expressly contemplated, and provided for, the same necessity did not exist. As has been already remarked in another place, and will abundantly appear from the remaining auxiliary clauses to the power to declare war, the Constitution abounds with pleonasms and repetitions, sometimes introduced from caution, sometimes from inattention, and sometimes from the imperfections of language.¹

§ 1176. But the express power "to grant letters of marque and reprisal" may not have been thought wholly unnecessary, because it is often a measure of peace, to prevent the necessity of a resort to war. Thus, individuals of a nation sometimes suffer from the depredations of foreign potentates, and yet it may not be deemed either expedient or necessary to redress such grievances by a general declaration of war. Under such circumstances, the law of nations authorizes the sovereign of the injured individual to grant him this mode of redress, whenever justice is denied to him by the State to which the party who has done the injury belongs. In this case, the letters of marque and reprisal (words used as synonymous, the latter, "reprisal," signifying a taking in return, the former, "letters of marque," the passing the frontiers in order to such taking) contain an authority to seize the bodies or goods of the subjects of the offending State, wherever they may be found, until satisfaction is made for the injury.² This power of reprisal seems, indeed, to be a dictate almost of nature itself, and is nearly related to, and plainly derived from, that of making war. It is only an incomplete state of hostilities, and often ultimately leads to a formal denunciation of war, if the injury is unredressed or extensive in its operations.³

¹ See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

² 1 Black. Comm. 258, 259.

³ 1 Black. Comm. 258, 259; Bynkershoek on War, ch. 24, p. 182, by Duponceau; Valin, *Traité des prises*, pp. 223, 321; 1 Tuck. Black. Comm. App. 271; 4 Elliot's Deb. 251.

§ 1177. The power to declare war is exclusive in Congress; and, as will be hereafter seen, the States are prohibited from engaging in it, unless in cases of actual invasion, or imminent danger thereof. It includes the exercise of all the ordinary rights of belligerents; and Congress may, therefore, pass suitable laws to enforce them. They may authorize the seizure and condemnation of the property of the enemy, within or without the territory of the United States, and the confiscation of debts due to the enemy. (a) But, until laws have been passed upon these subjects, no private citizens can enforce any such rights, and the judiciary is incapable of giving them any legitimate operation.¹

§ 1178. The next power of Congress is "to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years."

§ 1179. The power to raise armies is an indispensable incident to the power to declare war; and the latter would be literally *brutum fulmen* without the former,—a means of mischief without a power of defence.² Under the confederation, Congress possessed no power whatsoever to raise armies, but only "to agree upon the number of land forces, and to make requisitions upon each State for its quota, in proportion to the number of white inhabitants in such State;" which requisitions were to be binding; and thereupon the legislature of each State were to appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United

¹ *Brown v. United States*, 8 Cranch's R. 1.

² 4 Elliot's Deb. 220, 221.

(a) In case of a rebellion against its authority, the United States sustains the double character of a belligerent and a sovereign, and has the rights of both. *The Amy Warwick*, 2 Sprague, 123; *Prize cases*, 2 Black, 673; *The Grape Shot*, 9 Wall. 132; *Miller v. United States*, 11 Wall. 268. And the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of the enemy, and to dispose of it at the will of the

captor. *Miller v. United States*, 11 Wall. 268; *Tyler v. Defrees*, 11 Wall. 331. See the opinion of Attorney-General Hoar in *Weaver's Case*, 4 Am. Law Rev. 170; *Wilson's Case*, 4 Court of Claims Rep. 559; *Williams v. Wickerman*, 44 Mo. 484; *Knoefel v. Williams*, 30 Ind. 1.

The limitations upon the powers of the military authorities within the States where the operation of the laws is unobstructed and courts are open, are very fully and clearly stated in *Ex parte Milligan*, 4 Wall. 2; *Ex parte Field*, 5 Blatch. 63.

States.¹ The experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition. It was equally at war with economy, efficiency, and safety.² It gave birth to a competition between the States, which created a kind of auction of men. In order to furnish the quotas required of them, they outbid each other, till bounties grew to an enormous and insupportable size. On this account many persons procrastinated their enlistment, or enlisted only for short periods. Hence there were but slow and scanty levies of men in the most critical emergencies of our affairs; short enlistments, at an unparalleled expense; and continual fluctuations in the troops, ruinous to their discipline, and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence, also, arose those oppressive expedients for raising men, which were occasionally practised, and which nothing but the enthusiasm of liberty could have induced the people to endure.³ The burden was also very unequally distributed. The States near the seat of war, influenced by motives of self-preservation, made efforts to furnish their quotas, which even exceeded their abilities; while those at a distance were exceedingly remiss in their exertions. In short, the army was frequently composed of three bodies of men: first, raw recruits; secondly, persons who were just about completing their term of service; and thirdly, of persons who had served out half their term, and were quietly waiting for its determination. Under such circumstances, the wonder is, not that its military operations were tardy, irregular, and often unsuccessful, but that it was ever able to make headway at all against an enemy, possessing a fine establishment, well appointed, well armed, well clothed, and well paid.⁴ The appointment, too, by the States of all regimental officers,

¹ Art. 9; Art. 7.

² 1 American Museum, 270, 273, 283; 5 Marshall's Life of Washington, App. note 1.

³ The Federalist, Nos. 22, 23. The difficulties connected with this subject will appear still more striking in a practical view, from the letters of General Washington, and other public documents at the period. See 5 Marshall's Life of Washington, ch. 3, pp. 125, 126; ch. 5, pp. 212 to 220; ch. 6, pp. 238 to 248. See 6 Journals of Congress in 1780, *passim*; Circular Letter of Congress, in May, 1779; 5 Jour. of Congress, 224 to 231.

⁴ The Federalist, Nos. 22, 23.

had a tendency to destroy all harmony and subordination, so necessary to the success of military life.

§ 1180. There is great wisdom and propriety in relieving the government from the ponderous and unwieldy machinery of the requisitions and appointments under the confederation. The present system of the Union is *general* and direct, and capable of a uniform organization and action. It is essential to the common defence, that the national government should possess the power to raise armies, build and equip fleets, prescribe rules for the government of both, direct their operations, and provide for their support.¹

§ 1181. The clause, as originally reported, was "to raise armies;" and subsequently it was, upon the report of a committee, amended, so as to stand in its present form; and, as amended, it seems to have encountered no opposition in the convention.² It was, however, afterwards assailed in the State conventions, and before the people, with incredible zeal and pertinacity, as dangerous to liberty and subversive of the State governments. Objections were made against the general and indefinite power to raise armies, not limiting the number of troops; and to the maintenance of them in peace as well as in war.

§ 1182. It was said, that Congress, having an unlimited power to raise and support armies, might, if in their opinion the general welfare required it, keep large armies constantly on foot, and thus exhaust the resources of the United States. There is no control on Congress, as to numbers, stations, or government of them. They may billet them on the people at pleasure. Such an unlimited authority is most dangerous, and in its principles despotic; for being unbounded, it must lead to despotism. We shall, therefore, live under a government of military force.³ In respect to times of peace, it was suggested, that there is no necessity for having a standing army, which had always been held, under such circumstances, to be fatal to public rights and political freedom.⁴

§ 1183. To these suggestions it was replied with equal force and truth, that to be of any value, the power must be unlimited.

¹ The Federalist, No. 23 ; 2 Elliot's Debates, 92, 93.

² Journal of Convention, 221, 327, 328.

³ 2 Elliot's Debates, 285, 286, 307, 308, 430.

⁴ 2 Elliot's Debates, 307, 308, 430.

It is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the national means necessary to satisfy them. The power must be coextensive with all possible combinations of circumstances, and under the direction of the councils intrusted with the common defence. To deny this would be to deny the means, and yet require the end. These must, therefore, be unlimited in every matter essential to its efficacy, that is, in the formation, direction, and support of the national forces.¹ This was not doubted under the confederation; though the mode adopted to carry it into effect was utterly inadequate and illusory.² There could be no real danger from the exercise of the power. It was not here as in England, where the executive possessed the power to raise armies at pleasure; which power, so far as respected standing armies in time of peace, it became necessary to provide by the Bill of Rights, in 1688, should not be exercised without the consent of Parliament.³ Here the power is exclusively confined to the legislative body, to the representatives of the States and of the people of the States. And to suppose it will not be safe in their hands is to suppose that no powers of government, adapted to national exigencies, can ever be safe in any political body.⁴ Besides, the power is limited by the necessity, as will be seen, of biennial appropriations.⁵ The objection, too, is the more strange, because there are but two constitutions of the thirteen States, which attempt in any manner to limit the power; and these are rather cautions for times of peace, than prohibitions.⁶ The confederation itself contains no prohibition or limitation of the power.⁷ Indeed, in regard to times of war, it seems utterly preposterous to impose any limitations upon the power; since it is obvious that emergencies may arise, which would require the most various and independent exercises of it. The country would otherwise be in danger of losing both its liberty and its sovereignty, from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.

¹ The Federalist, No. 23; 2 Elliot's Debates, 92, 93, 438.

² 2 Elliot's Debates, 438.

³ 1 Black. Comm. 262, 413.

⁴ The Federalist, Nos. 23, 26.

⁵ The Federalist, Nos. 24, 25.

⁶ The Federalist, No. 24, and note; Id. No. 26.

⁷ The Federalist, No. 24; 2 Elliot's Debates, 438.

§ 1184. But in times of peace the power may be at least equally important, though not so often required to be put in full exercise. The United States are surrounded by the colonies and dependencies of potent foreign governments, whose maritime power may furnish them with the means of annoyance and mischief and invasion. To guard ourselves against evils of this sort, it is indispensable for us to have proper forts and garrisons, stationed at the weak points, to overawe or check incursions. Besides, it will be equally important to protect our frontiers against the Indians, and keep them in a state of due submission and control.¹ The garrisons can be furnished only by occasional detachments of militia, or by regular troops in pay of the government. The first would be impracticable, or extremely inconvenient, if not positively pernicious. The militia would not, in times of profound peace, submit to be dragged from their occupations and families to perform such a disagreeable duty. And if they would, the increased expenses of a frequent rotation in the service, the loss of time and labor, and the breaking up of the ordinary employments of life, would make it an extremely ineligible scheme of military power. The true and proper recourse should, therefore, be a permanent, but small standing army for such purposes.² And it would only be, when our neighbors should greatly increase their military force, that prudence and a due regard to our own safety would require any augmentation of our own.³ It would be wholly unjustifiable to throw upon the States the defence of their own frontiers, either against the Indians, or against foreign foes. The burden would often be disproportionate to their means, and the benefit would often be largely shared by the neighboring States. The common defence should be provided for out of the common treasury. The existence of a federal government, and at the same time of military establishments under State authority, are not less at variance with each other, than a due supply of the federal treasury and the system of quotas and requisitions.⁴

§ 1185. It is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. If a prohibition should be imposed upon the United States against raising

¹ The Federalist, Nos. 24, 25 ; 2 Elliott's Debates, 292, 293.

² The Federalist, No. 24 ; 2 Elliot's Debates, 292, 293.

³ The Federalist, Nos. 24, 41.

⁴ Id. No. 25.

armies in time of peace, it would present the extraordinary spectacle to the world of a nation incapacitated by a Constitution of its own choice from preparing for defence before an actual invasion. As formal declarations of war are in modern times often neglected, and are never necessary, the presence of an enemy within our territories would be required, before the government would be warranted to begin levies of men for the protection of the State. The blow must be received, before any attempts could be made to ward it off, or to return it. Such a course of conduct would at all times invite aggression and insult; and enable a formidable rival or secret enemy to seize upon the country, as a defenceless prey, or to drain its resources by a levy of contributions, at once irresistible and ruinous.¹ It would be in vain to look to the militia for an adequate defence under such circumstances. This reliance came very near losing us our independence, and was the occasion of the useless expenditure of many millions. The history of other countries, and our past experience, admonish us, that a regular force, well disciplined and well supplied, is the cheapest, and the only effectual means of resisting the inroads of a well disciplined foreign army.² In short, under such circumstances the Constitution must be either violated (as it in fact was by the States under the confederation),³ or our liberties must be placed in extreme jeopardy. Too much precaution often leads to as many difficulties as too much confidence. How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? The means of security can be only regulated by the means and the danger of attack. They will, in fact, ever be determined by these rules, and no other. It will be in vain to oppose constitutional barriers to the impulse of self-preservation.⁴

§ 1186. But the dangers from abroad are not alone those which are to be guarded against in the structure of the national government. Cases may occur, and indeed are contemplated by the Constitution itself to occur, in which military force may be indispensable to enforce the laws, or to suppress domestic insurrections. Where the resistance is confined to a few insurgents, the

¹ The Federalist, No. 25 ; 2 Elliot's Debates, 92, 93.

² The Federalist, Nos. 25, 41.

³ Id. 25.

⁴ The Federalist, No. 41 ; 3 Elliot's Debates, 305.

suppression may be ordinarily and safely confided to the militia. But where it is extensive, and especially if it should pervade one or more States, it may become important and even necessary to employ regular troops, as at once the most effective and the most economical force.¹ Without the power to employ such a force in time of peace for domestic purposes, it is plain that the government might be in danger of being overthrown by the combinations of a single faction.²

§ 1187. The danger of an undue exercise of the power is purely imaginary. It can never be exerted, but by the representatives of the people of the States; and it must be safe there, or there can be no safety at all in any republican form of government.³ Our notions, indeed, of the dangers of standing armies, in time of peace, are derived in a great measure from the principles and examples of our English ancestors. In England, the king possessed the power of raising armies in the time of peace according to his own good pleasure. And this prerogative was justly esteemed dangerous to the public liberties. Upon the revolution of 1688, Parliament wisely insisted upon a bill of rights, which should furnish an adequate security for the future. But how was this done? Not by prohibiting standing armies altogether in time of peace; but, as has been already seen, by prohibiting them *without the consent of Parliament*.⁴ This is the very proposition contained in the Constitution; for Congress can alone raise armies; and may put them down, whenever they choose.

§ 1188. It may be admitted, that standing armies may prove dangerous to the State. But it is equally true, that the want of them may also prove dangerous to the State. What, then, is to be done? The true course is to check the undue exercise of the power, not to withhold it.⁵ This the Constitution has attempted to do by providing, that “no appropriation of money to that use shall be for a longer term than two years.” Thus, unless the necessary supplies are voted by the representatives of the people every two years, the whole establishment must fall. Congress may, indeed, by an act for this purpose, disband a standing army at any time; or vote the supplies only for one year, or for a

¹ The Federalist, Nos. 26, 28.

² 2 Elliot's Debates, 92, 93.

³ The Federalist, Nos. 23, 26, 28.

⁴ The Federalist, No. 26; 1 Black. Comm. 413.

⁵ The Federalist, No. 41; 2 Elliot's Debates, 93, 308, 309.

shorter period. But the Constitution is imperative, that no appropriation shall prospectively reach beyond the biennial period. So that there would seem to be every human security against the possible abuse of the power.¹

§ 1189. But, here again it was objected, that the executive might keep up a standing army in time of peace, notwithstanding no supplies should be voted. But how can this possibly be done? The army cannot go without supplies; it may be disbanded at the pleasure of the legislature; and it would be absolutely impossible for any President, against the will of the nation, to keep up a standing army *in terrorem populi*.²

§ 1190. It was also asked, why an appropriation should not be annually made, instead of biennially, as is the case in the British Parliament.³ The answer is, that Congress may in their pleasure limit the appropriation to a single year; but exigencies may arise, in which, with a view to the advantages of the public service and the pressure of war, a biennial appropriation might be far more expedient, if not absolutely indispensable. Cases may be supposed, in which it might be impracticable for Congress, in consequence of public calamities, to meet annually for the despatch of business. But the supposed example of the British Parliament proves nothing. That body is not restrained by any constitutional provision from voting supplies for a standing army for an unlimited period. It is the mere practice of Parliament, in the exercise of its own discretion, to make an annual vote of supplies. Surely, if there is no danger in confiding an unlimited power of this nature to a body chosen for seven years, there can be none in confiding a limited power to an American Congress, chosen for two years.⁴

§ 1191. In some of the State conventions an amendment was proposed, requiring, that no standing army or regular forces be kept up in time of peace, except for the necessary protection and defence of forts, arsenals, and dock-yards, without the consent of two-thirds of both houses of Congress.⁵ But it was silently suffered to die away with the jealousies of the day. The practi-

¹ The Federalist, Nos. 26, 41.

² The Federalist, No. 26.

³ 1 Tuck. Black. Comm. App. 272; 1 Black. Comm. 414, 415.

⁴ The Federalist, No. 41.

⁵ 1 Tuck. Black. Comm. App. 271, 272, 379. An attempt was also made in the convention to insert a clause, limiting the number of the army in time of peace to a — number; but it was negatived. Journal of Convention, p. 262.

cal course of the government on this head has allayed all fears of the people, and fully justified the opinions of the friends of the Constitution. It is remarkable, that scarcely any power of the national government was at the time more strongly assailed by appeals to popular prejudices, or vindicated with more full and masculine discussion. The Federalist gave it a most elaborate discussion, as one of the critical points of the Constitution.¹ In the present times the subject attracts no notice, and would scarcely furnish a topic even for popular declamation. Ever since the Constitution was put into operation, Congress have restrained their appropriations to the current year; and thus practically shown the visionary nature of these objections.

§ 1192. Congress in 1798, in expectation of a war with France, authorized the President to accept the services of any companies of volunteers who should associate themselves for the service, and should be armed, clothed, and equipped at their own expense, and to commission their officers.² This exercise of power was complained of at the time, as a virtual infringement of the constitutional authority of the States in regard to the militia; and as such, it met with the disapprobation of a learned commentator.³ His opinion does not, however, seem since to have received the deliberate assent of the nation. During the late war with Great Britain, laws were repeatedly passed authorizing the acceptance of volunteer corps of the militia, under their own officers; and eventually the President was authorized, with the consent of the Senate, to commission officers for such volunteer corps. These laws exhibit the decided change of the public opinion on this subject; and they deserve more attention, since the measures were promoted and approved under the auspices of the very party which had inculcated an opposite opinion.⁴ It is proper to remark, that the Federalist maintained, that the disciplining and effective organization of the whole militia would be impracticable; that the attention of the government ought

¹ The Federalist, Nos. 24 to 29.

² Act of 28th of May, 1798, ch. 64; Act of 22d of June, 1798, ch. 74; Act of 2d of March, 1799, ch. 187.

³ 1 Tuck. Black. Comm. App. 273, 274, 329, 330. See also Virginia Report and Resolutions, 9th of January, 1800, pp. 53 to 56.

⁴ See Act of 8th of Feb. 1812, ch. 22; Act of 6th of July, 1812, ch. 138; Act of 24th of Feb. 1814, ch. 75; Act of 30th of March, 1814, ch. 96; Act of 27th of Jan. 1815, ch. 178. See also Act of 24th of Feb. 1807, ch. 70.

particularly to be directed to the formation of a select corps of moderate size, upon such principles as would really fit them for service in case of need; and that such select corps would constitute the best substitute for a large standing army, and the most formidable check upon any undue military powers,—since it would be composed of citizens well disciplined and well instructed in their rights and duties.¹ (a)

¹ The Federalist, No. 29.

(a) Near the close of the War of 1812, the Secretary of War made an elaborate report recommending conscription as a means of recruiting the national armies. This was strongly protested against in some quarters as unconstitutional (see Dwight's History of the Hartford Convention, 359), and the recommendation was not adopted. During the late civil war, however, conscription became a necessity, and was carried out not only by the government but also by the insurgents under constitutional provisions like those of the Union. The right to do this was but feebly contested, and indeed cannot be seriously doubted.

It is remarkable that during the civil war but few questions respecting the war power were passed upon by the courts. Some extravagant claims were put forth on behalf of this power by theorists, as if where war existed, Constitution and laws alike were to give way, and the military authority to be supreme and unlimited. Undoubtedly the war power is great and terrible, and there is no calamity to the country or its institutions—even to the dismemberment of the former, or the overthrow of the latter—that might not by possibility result from an exercise of the power to declare war and make peace. In a great and desperate struggle for existence, the law of necessity may become the absolute ruler, and private and public rights may alike give way before it. But these are what Mr. Walpole once called the “never-to-be-expected-occasions,” “never to be thought of but when an utter subversion of the laws of the realm threatens

the whole frame of the Constitution, and no redress can otherwise be hoped for.” The people have never delegated to any department of the government, or to any officer, civil or military, the authority to subvert the laws, or put aside the Constitution, either temporarily or permanently; and whoever finds himself tempted to do either, would do well to ponder the words of Gov. Wm. Livingston: “If any necessity demands any measures contrary to the law, I hope those measures will be executed by officers *who never have been sworn to act agreeably to it.*”

In *Ex parte Milligan*, 4 Wall. 118, Mr. Justice Davis, speaking for the majority of the court, denied that military commissions could be empowered to try citizens not in military service for treasonable acts or conspiracies in those parts of the country where the courts were open and the laws unobstructed. This point is so important that we copy his remarks at some length.

“The controlling question in the case is this: Upon the *facts* stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it *jurisdiction* legally to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at home, arrested by the military power of the United States, imprisoned, and on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of

§ 1193. The next power of Congress is "to provide and maintain a navy."

the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man ?

"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people ; for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured ; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere ; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says : that 'the trial of all crimes except in case of impeachment shall be by jury ;' and in

the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure ; and directs that a judicial warrant shall not issue 'without proof of probable cause supported by oath or affirmation.' The fifth declares that 'No person shall be held to answer for a capital or other infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, nor be deprived of life, liberty, or property without due process of law.' And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words : 'In all criminal trials the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.' These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition ; and but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proved the discernment of our ancestors ; for even these provisions,

§ 1194. Under the confederation, Congress possessed the power "to build and equip a navy."¹ The same language was

expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as had been happily proved by the result of the great effort to throw off its just authority.

"Have any of the rights guaranteed by the Constitution been violated in the case of Milligan; and, if so, what are they?"

"Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended

that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction.

"But it is said that the jurisdiction is complete under the 'laws and usages of war.'"

"It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed; and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and, to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

"Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon

¹ Art. 2.

adopted in the original draft of the Constitution, and it was amended by substituting the present words, apparently without

after this military tribunal was ended, the Circuit Court met, peaceably transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a State eminently distinguished for patriotism, by judges commissioned during the rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said, arrest him, confine him closely, render him powerless to do further mischief, and then present his case to the grand jury of the district with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

"Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the federal Constitution; and judicial decision has often been invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, *this right* — one of the most valued in a free coun-

try — is preserved to every one accused of crime who is not attached to the army or navy, or militia in actual service. The sixth amendment affirms, that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, '*excepts cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;*' and the framers of the Constitution doubtless meant to limit the right of trial by jury in the sixth amendment to those persons who were subject to indictment or presentment in the fifth.

"The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in naval or military service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial

objection, as more broad and appropriate.¹ In the convention, the propriety of granting the power seems not to have been ques-

are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion, — if the passions of men are aroused, and the restraints of law weakened, if not disregarded, — these safeguards need and should receive the watchful care of those entrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the revolution.

“It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this, that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, of which he is to judge) has the power within the lines of his military district to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of this lawful authority cannot be restrained, except by his superior officer or the President of the United States.

“If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

“The statement of this proposition shows its importance, for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the Constitution, and effectually renders ‘the military in-

dependent of and superior to the civil power,’ — the attempt to do which by the king of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in the conflict one or the other must perish.

“This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln, and if this right is conceded, and the calamities of war again befall us, the dangers of human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew — the history of the world told them — the nation they were founding, be its existence short or long, would be involved in war, how often or how long-continued human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free-men. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.

“It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. In

¹ Journ. of Convention, 221, 262.

tioned. But it was assailed in the State conventions as dangerous. It was said, that commerce and navigation are the principal

every war there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. The Constitution goes no further. It does not say, after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

"It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a com-

munity, and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion, to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late rebellion, required that the loyal States should be placed within the limits of certain military districts, and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

"It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

"It follows, from what has been said

sources of the wealth of the maritime powers of Europe; and if we engaged in commerce, we should soon become their rivals.

on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.

"As necessity creates the rule, so it limits its duration; for if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion it could have been enforced in Virginia, where the national authority was overthrown and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one State, when, in another, it would be 'mere lawless violence.'

"We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

"From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, 'that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer, and that

regularly when the king's courts are open it is time of peace in judgment of law,' down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

"During the present century, an instructive debate on this subject occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate, and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that 'when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime.'

"So sensitive were our revolutionary fathers on this subject, although Boston was almost in a state of siege when Gen. Gage issued his proclamation of martial law, they spoke of it as 'an attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law.' The Virginia Assembly also denounced a similar measure on the part of Governor Dunmore as 'an assumed power, which the king himself cannot exercise; because it annuls the law of the land, and introduces the most execrable of all systems, martial law.'

"In some parts of the country during the war of 1812 our officers made arbitrary arrests, and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith v. Shaw*, 12 Johns. 257, and *McConnell v. Hampden*, Id. 234, are

A navy would soon be thought indispensable to protect it. But the attempt on our part to provide a navy would provoke these

illustrations which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

"It is contended that *Luther v. Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island until that period had no other form of local government than the charter granted by King Charles II., in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislative would not afford the relief in their power; and, without the authority of law formed a new and independent Constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. *Borden*, in the military service of the *old* government, broke open the house of *Luther*, who supported the *new*, in order to arrest him. *Luther* brought suit against *Borden*; and the question was whether, under the Constitution and laws of the State, *Borden* was justified. This court held that a State 'may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;' and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which *this court* could question its authority; and as *Borden* acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the State judiciary, he was

justified in breaking into and entering *Luther's* house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the federal Constitution, and the court did not consider it necessary even to inquire to what extent nor under what circumstances that power may be exercised by a State.

"We do not deem it important to examine further the adjudged cases; and shall therefore conclude without any additional reference to authorities."

The Chief Justice, speaking for himself and Justices Wayne, Swayne, and Miller, concurred in holding that Congress had never authorized the action of the commission, but they differed with the majority as to its power to do so.

See further, *In re Egan*, 5 Blatch. 319.

The most important cases of the exercise of unusual authority during the late civil war were the following:—

1. The proclamation by President Lincoln of the emancipation of slaves within all the territory held by the insurgents. This was sustained by the courts as a war measure. See *Slabach v. Cushman*, 12 Fla. 472; *Dorris v. Grace*, 24 Ark. 326; *Weaver v. Lapsley*, 42 Ala. 601; *Morgan v. Nelson*, 43 Ala. 586; *Hall v. Keese*, 31 Texas, 504. And see *Texas v. White*, 7 Wall. 200.

2. The establishment of courts by military authority within insurgent districts occupied during the civil war by the Union army, was not unconstitutional. *Mechanics' Bank v. Union Bank*, 22 Wall. 276; *The Grapeshot*, 9 Wall. 129.

3. The appointment by the President of provisional governors over the States in revolt until, in pursuance of acts of Congress, the State governments could be reconstructed. "So long as the war continued it cannot be denied that he might institute temporary governments

powers, who would not suffer us to become a naval power. Thus, we should be immediately involved in wars with them. The expenses, too, of maintaining a suitable navy would be enormous, and wholly disproportionate to our resources. If a navy should be provided at all it ought to be limited to the mere protection of our trade.¹ It was further urged, that the Southern States would share a large portion of the burdens of maintaining a navy, without any corresponding advantages.²

§ 1195. With the nation at large, these objections were not deemed of any validity. The necessity of a navy, for the protection of commerce and navigation, was not only admitted, but made a strong ground for the grant of the power. One of the great objects of the Constitution was the encouragement and protection of navigation and trade. Without a navy it would be utterly impossible to maintain our right to the fisheries, and our trade and navigation on the Lakes, and the Mississippi, as well as our foreign commerce. It was one of the blessings of the Union that it would be able to provide an adequate support and protection for all these important objects. Besides, a navy would be absolutely indispensable to protect our whole Atlantic frontier, in case of a war with a foreign maritime power. We should otherwise be liable, not only to the invasion of strong regular forces of the enemy, but to the attacks and incursions of every predatory adventurer. Our maritime towns might all be put under contribution; and even the entrance and departure from our own ports be interdicted, at the caprice or the hostility of a foreign power. It would also be our cheapest, as well as our best defence; as it would save us the expense of numerous forts and garrisons upon the sea-coast, which, though not effectual for all, would still be required for some purposes. In short, in a maritime warfare, without this means of defence, our commerce would be driven from the ocean, our ports would be blockaded, our sea-coast infested with plunderers, and our vital interests put at hazard.³

¹ 2 Elliot's Deb. 224, 319, 320.

² 2 Elliot's Deb. 319, 320.

³ The Federalist, Nos. 11, 24, 41. See also 1 Tuck. Black. Comm. App. 272.

within insurgent districts, occupied by the national forces, or take measures, in any State, for the restoration of State governments faithful to the Union, em-

ploying, however, in such efforts, only such means and agents as were authorized by constitutional laws." Chase, C. J., in *Texas v. White*, 7 Wall. 730. C.

§ 1196. Although these considerations were decisive with the people at large, in favor of the power, from its palpable necessity and importance to all the great interests of the country, it is within the memory of all of us, that the same objections for a long time prevailed with a leading party in the country,¹ and nurtured a policy which was utterly at variance with our duties, as well as our honor. It was not until during the late war with Great Britain, when our little navy, by a gallantry and brilliancy of achievement almost without parallel, had literally fought itself into favor, that the nation at large began to awake from its lethargy on this subject, and to insist upon a policy, which should at once make us respected and formidable abroad, and secure protection and honor at home.² It has been proudly said by a learned commentator on the laws of England, that the royal navy of England hath ever been its greatest defence and ornament. It is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can be apprehended to liberty.³ Every American citizen ought to cherish the same sentiment, as applicable to the navy of his own country.

§ 1197. The next power of Congress is "to make rules for the government and regulation of the land and naval forces." (a) This is a natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy. Its pro-

¹ See 5 Marshall's Life of Washington, ch. 7, pp. 523 to 531.

² Lest it should be supposed that these remarks are not well founded, the following passage is extracted from the celebrated Report and Resolutions of the Virginia legislature, of 7th and 11th Jan. 1800, which formed the text-book of many political opinions for a long period: "With respect to the navy, it may be proper to remind you, that whatever may be the proposed object of its establishment, or whatever the prospect of temporary advantages resulting therefrom, it is demonstrated, by the experience of all nations who have adventured far into naval policy, that such prospect is ultimately delusive; and that a navy has ever in practice been known more as an instrument of power, a source of expense, and an occasion of collisions and wars with other nations, than as an instrument of defence, of economy, or of protection to commerce. Nor is there any nation, in the judgment of the general assembly, to whose circumstances this remark is more applicable than to the United States." pp. 57, 58. And the senators and representatives were instructed and requested, by one of the resolutions, "to prevent any augmentation of the navy, and to promote any proposition for reducing it, as circumstances will permit, within the narrowest limits compatible with the protection of the sea-coasts, ports, and harbors of the United States." p. 59.

³ 1 Black. Comm. 418.

(a) See *Presser v. Illinois*, 116 U. S. 252.

priety, therefore, scarcely could be, and never has been denied, and need not now be insisted on. The clause was not in the original draft of the Constitution; but was added without objection by way of amendment.¹ It was, without question, borrowed from a corresponding clause in the articles of confederation,² where it was with more propriety given, because there was a prohibition of all implied powers. In Great Britain, the king, in his capacity of generalissimo of the whole kingdom, has the sole power of regulating fleets and armies.³ But Parliament has repeatedly interposed; and the regulation of both is now in a considerable measure provided for by acts of Parliament.⁴ The whole power is far more safe in the hands of Congress than of the executive; since, otherwise, the most summary and severe punishments might be inflicted at the mere will of the executive.

§ 1198. It is a natural result of the sovereignty over the navy of the United States, that it should be exclusive. Whatever crimes, therefore, are committed on board of public ships of war of the United States, whether they are in port or at sea, they are exclusively cognizable and punishable by the government of the United States. The public ships of sovereigns, wherever they may be, are deemed to be extraterritorial, and enjoy the immunities from the local jurisdiction belonging to their sovereign.⁵ (a)

¹ Journal of Convention, pp. 221, 262.

² Art. 9.

³ 1 Black. Comm. 262, 421.

⁴ 1 Black. Comm. 413, 414, 415, 420, 421.

⁵ See *United States v. Bevans*, 3 Wheaton's R. 356, 390. *The Schr. Exchange*, 7 Cranch's R. 116.

(a) *Brown v. Duchesne*, 2 Curt. 371 and 19 How. 183.

CHAPTER XXII.

POWER OVER THE MILITIA.

§ 1199. THE next power of Congress is “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.”

§ 1200. This clause seems, after a slight amendment, to have passed the convention without opposition.¹ It cured a defect severely felt under the confederation, which contained no provision on the subject.

§ 1201. The power of regulating the militia, and of commanding its services to enforce the laws, and to suppress insurrections, and repel invasions, is a natural incident to the duty of superintending the common defence, and preserving the internal peace of the nation. In short, every argument which is urged, or can be urged against standing armies in time of peace, applies forcibly to the propriety of vesting this power in the national government. There is but one of two alternatives, which can be resorted to in cases of insurrection, invasion, or violent opposition to the laws; either to employ regular troops, or to employ the militia to suppress them. In ordinary cases, indeed, the resistance to the laws may be put down by the *posse comitatus*, or the assistance of the common magistracy. But cases may occur, in which such a resort would be utterly vain, and even mischievous; since it might encourage the factious to more rash measures, and prevent the application of a force, which would at once destroy the hopes and crush the efforts of the disaffected. The general power of the government to pass all laws necessary and proper to execute its declared powers, would doubtless authorize laws to call forth the *posse comitatus*, and employ the common magistracy, in cases where such measures would suit the emergency.² But if the militia could not be called in aid, it would be absolutely indispensable to the common safety to keep up a

¹ Journal of Convention, 221, 283.

² 2 Elliot's Debates, 300, 304, 305, 308, 309.

strong regular force in time of peace.¹ The latter would certainly not be desirable, or economical; and therefore this power over the militia is highly salutary to the public repose, and at the same time an additional security to the public liberty. In times of insurrection or invasion, it would be natural and proper that the militia of a neighboring State should be marched into another to resist a common enemy, or guard the republic against the violences of a domestic faction or sedition. But it is scarcely possible, that in the exercise of the power the militia should ever be called to march great distances, since it would be at once the most expensive and the most inconvenient force which the government could employ for distant expeditions.² The regulation of the whole subject is always to be in the power of Congress; and it may from time to time be moulded so as to escape from all dangerous abuses.

§ 1202. Notwithstanding the reasonableness of these suggestions, the power was made the subject of the most warm appeals to the people to alarm their fears, and surprise their judgment.³ At one time it was said, that the militia under the command of the national government might be dangerous to the public liberty; at another, that they might be ordered to the most distant places, and burdened with the most oppressive services; and at another, that the States might thus be robbed of their immediate means of defence.⁴ How these things could be accomplished with the consent of both houses of Congress, in which the States and the people of the States are represented, it is difficult to conceive. But the highly-colored and impassioned addresses used on this occasion produced some propositions of amendment in the State conventions,⁵ which, however, were never duly ratified, and have long since ceased to be felt, as matters of general concern.

§ 1203. The next power of Congress is, "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United

¹ The Federalist, No. 29 ; 2 Elliot's Debates, 292, 293, 294, 308, 309.

² The Federalist, No. 29 ; 2 Elliot's Debates, 92, 107, 108, 292, 293, 294, 308, 309 ; 3 Elliot's Debates, 305, 306.

³ 2 Elliot's Debates, 66, 67, 307, 310, 314, 315 ; The Federalist, No. 29 ; Luther Martin's Address, Yates's Minutes ; 4 Elliot's Debates, 33, 34.

⁴ See The Federalist, No. 29 ; 2 Elliot's Debates, 285, 286, 287, 289, 307, 310.

⁵ 1 Tuck. Black. Comm. App. 273.

States; reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

§ 1204. This power has a natural connection with the preceding, and, if not indispensable to its exercise, furnishes the only adequate means of giving it promptitude and efficiency in its operations. It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia will be attended with the most beneficial effects, whenever they are called into active service. It will enable them to discharge the duties of the camp and field with mutual intelligence and concert, an advantage of peculiar moment in the operations of an army; and it will enable them to acquire, in a much shorter period, that degree of proficiency in military functions, which is essential to their usefulness. Such a uniformity, it is evident, can be attained only through the superintending power of the national government.¹

§ 1205. This clause was not in the original draft of the Constitution; but it was subsequently referred to a committee, who reported in favor of the power; and after considerable discussion it was adopted in its present shape by a decided majority. The first clause in regard to organizing, arming, disciplining, and governing the militia, was passed by a vote of nine States against two; the next referring the appointment of officers to the States, after an ineffectual effort to amend it by confining the appointment to officers under the rank of general officers, was passed without a division; and the last, referring the authority to train the militia according to the discipline prescribed by Congress, was passed by a vote of seven States against four.²

§ 1206. It was conceived by the friends of the Constitution, that the power thus given, with the guards reserving the appointment of the officers and the training of the militia to the States, made it not only wholly unexceptionable, but in reality an additional security to the public liberties.³ It was, nevertheless, made a topic of serious alarm and powerful objection. It was

¹ The Federalist, Nos. 4, 29; 1 Tuck. Black. Comm. App. 273, 274; 5 Marshall's Life of Washington, ch. 1, p. 54. See Virginia Report and Resolutions, 7 Jan. 1800, pp. 54 to 57.

² Journal of Convention, 221, 263, 272, 280, 281, 282, 357, 376, 377.

³ 2 Elliot's Deb. 92, 301, 310, 312, 314, 317.

suggested, that it was indispensable to the States they should possess the control and discipline of the militia. Congress might, under pretence of organizing and disciplining them, inflict severe and ignominious punishments on them.¹ The power might be construed to be exclusive in Congress. Suppose, then, that Congress should refuse to provide for arming or organizing them, the result would be, that the States would be utterly without the means of defence, and prostrate at the feet of the national government.² It might also be said, that Congress possessed the exclusive power to suppress insurrections, and repel invasions, which would take from the States all effective means of resistance.³ The militia might be put under martial law, when not under duty in the public service.⁴

§ 1207. It is difficult fully to comprehend the influence of such objections, urged with much apparent sincerity and earnestness at such an eventful period. The answers then given seem to have been, in their structure and reasoning, satisfactory and conclusive. But the amendments proposed to the Constitution (some of which have been since adopted⁵) show that the objections were extensively felt and sedulously cherished. The power of Congress over the militia, it was urged, was limited, and concurrent with that of the States. The right of governing them was confined to the single case of their being in the actual service of the United States, in some of the cases pointed out in the Constitution. It was then, and then only, that they could be subjected by the general government to martial law.⁶ If Congress did not choose to arm, organize, or discipline the militia, there would be an inherent right in the States to do it.⁷ All that the Constitution intended was, to give a power to Congress to insure uniformity, and thereby efficiency. But if Congress refused, or neglected to perform the duty, the States had a perfect

¹ 2 Elliot's Debates, 301, 307, 310, 312.

² 2 Elliot's Debates, 145, 290, 310, 311, 312; Luther Martin's Address, Yates's Minutes; 4 Elliot's Debates, 34, 35.

³ 2 Elliot's Debates, 310, 311, 312, 314, 315, 316, 317, 318.

⁴ 2 Elliot's Debates, 287, 288, 294.

⁵ 1 Tuck. Black. Comm. App. 273.

⁶ 2 Elliot's Debates, 299, 311.

⁷ 2 Elliot's Debates, 293, 294, 312, 313, 314, 326, 327, 439; 1 Tuck. Black. Comm. App. 272, 273; Rawle on the Constitution, ch. 9, pp. 111, 112; *Houston v. Moore*, 5 Wheat. R. 1, 21, 45, 48 to 52.

concurrent right, and might act upon it to the utmost extent of sovereignty.¹ As little pretence was there to say that Congress possessed the exclusive power to suppress insurrections and repel invasions. Their power was merely competent to reach these objects; but did not, and could not, in regard to the militia, supersede the ordinary rights of the States. It was, indeed, made a duty of Congress to provide for such cases; but this did not exclude the co-operation of the States.² The idea of Congress inflicting severe and ignominious punishments upon the militia in times of peace was absurd.³ It presupposed that the representatives had an interest, and would intentionally take measures, to oppress them, and alienate their affections. The appointment of the officers of the militia was exclusively in the States; and how could it be presumed that such men would ever consent to the destruction of the rights or privileges of their fellow-citizens.⁴ The power to discipline and train the militia, except when in the actual service of the United States, was also exclusively vested in the States; and under such circumstances, it was secure against any serious abuses.⁵ It was added, that any project of disciplining the whole militia of the United States would be so utterly impracticable and mischievous, that it would probably never be attempted. The most that could be done would be to organize and discipline select corps; and these, for all general purposes, either of the States, or of the Union, would be found to combine all that was useful or desirable in militia services.

§ 1208. It is hardly necessary to say how utterly without any practical justification have been the alarms, so industriously spread upon this subject, at the time when the Constitution was put upon its trial.⁶ Upon two occasions only has it been found necessary, on the part of the general government, to require the aid of the militia of the States, for the purpose of executing the

¹ *Houston v. Moore*, 5 Wheat. R. 1, 16, 17, 21, 22, 24, 32, 51, 52, 56; 3 *Sergeant & Rawle*, 169. See *Luther v. Borden*, 7 Howard, 1.

² 2 *Elliot's Debates*, 312, 313, 316, 317, 318, 368; *Rawle on the Constitution*, ch. 9, p. 111.

³ 2 *Elliot's Debates*, 304, 309.

⁴ 2 *Elliot's Debates*, 368; *Rawle on the Constitution*, ch. 9, p. 112.

⁵ See *The Federalist*, No. 29; 1 *Tuck. Black. Comm. App.* 274; *Rawle on the Constitution*, ch. 9, p. 112.

⁶ *The Federalist*, No. 29.

laws of the Union, suppressing insurrections, or repelling invasions. The first was to suppress the insurrection in Pennsylvania, in 1794;¹ and the other, to repel the enemy in the recent war with Great Britain. On other occasions, the militia has indeed been called into service, to repel the incursions of the Indians; but in all such cases, the injured States have led the way, and requested the co-operation of the national government. In regard to the other power, of organizing, arming, and disciplining the militia, Congress passed an act in 1792,² more effectually to provide for the national defence, by establishing a uniform militia throughout the United States. The system provided by this act, with the exception of that portion which established the rules of discipline and field service, has ever since remained in force. And the militia are now governed by the same general system of discipline and field exercise which is observed by the regular army of the United States.³ No jealousy of military power and no dread of severe punishments are now indulged. And the whole militia system has been as mild in its operation as it has been satisfactory to the nation.

§ 1209. Several questions, of great practical importance, have arisen under the clauses of the Constitution respecting the power over the militia, which deserve mention in this place. It is observable, that power is given to Congress "to *provide* for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Accordingly, Congress, in 1795, in pursuance of this authority, and to give it a practical operation, provided by law, "that whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the President to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary, to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." Like provisions are made for the other cases stated in the Constitution.⁴ The constitution-

¹ 5 Marsh. Life of Washington, ch. 8, pp. 576 to 592; 2 Pitk. Hist. ch. 23, pp. 421 to 428.

² Act of 8th May, 1792, ch. 33.

³ Act of 1820, ch. 97; Act of 1821, ch. 68.

⁴ Act of 1795, ch. 101.

ality of this act has not been questioned,¹ although it provides for calling forth the militia, not only in cases of invasion, but of imminent danger of invasion; for the power to repel invasions must include the power to provide against any attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is, to provide the requisite force for action before the invader has reached the territory of the nation.² Nor can there be a doubt that the President, who is, as will be presently seen, by the Constitution the commander-in-chief of the army and navy of the United States, and of the militia when called into the actual service of the United States, is the proper functionary to whom this high and delicate trust ought to be confided. A free people will naturally be jealous of the exercise of military power; and that of calling forth the militia is certainly one of no ordinary magnitude. It is, however, a power limited in its nature to certain exigencies; and, by whomsoever it is to be executed, it carries with it a corresponding responsibility.³ Who is so fit to exercise the power and to incur the responsibility as the President?

§ 1210. But a most material question arises: By whom is the exigency (the *casus fœderis*, if one may so say) to be decided? Is the President the sole and exclusive judge whether the exigency has arisen; or is it to be considered as an open question, which every officer, to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President?⁴ (a) This question was much agitated during the late war with Great Britain, although it is well known that it had been practically settled by the government, in the year 1794, to belong exclusively to the President;⁵ and no inconsiderable diversity of opinion was then manifested in the heat of the controversy, *pendente lite, et flagrante bello*. In Connecticut and Massachusetts it was held, that the governors of the States

¹ *Houston v. Moore*, 5 Wheat. R. 1, 60; *Martin v. Mott*, 12 Wheat. R. 19; *Houston v. Moore*, 3 Sergeant & Rawle, 169; *Duffield v. Smith*, 3 Sergeant & Rawle, 590; *Vanderheyden v. Young*, 11 Johns. R. 150.

² *Martin v. Mott*, 12 Wheat. R. 19, 29.

³ *Martin v. Mott*, 12 Wheat. R. 19, 29; Rawle on Constitution, ch. 13, p. 155, &c.

⁴ *Martin v. Mott*, 12 Wheat. R. 19, 29, 30.

⁵ See *Houston v. Moore*, 5 Wheat. R. 37.

(a) See *Luther v. Borden*, 7 How. 44.

to whom orders were addressed by the President to call forth the militia, on account of danger of invasion, were entitled to judge for themselves whether the exigency had arisen, and were not bound by the opinion or orders of the President.¹ (a) This doctrine, however, was disapproved elsewhere. It was contested by the government of the United States,² and was renounced by other States.³

¹ 1 Kent's Comm. Lect. 12, pp. 244 to 250; 8 Mass. R. Supp. 547 *et seq.*; Rawle on the Constitution, ch. 13, p. 155, &c. At a later period, this doctrine seems to have been abandoned by Massachusetts. See Report and Resolves of Massachusetts, June 12, 1818, and February 15, 1830. See also Resolutions of Maine legislature, in 1820.

² See President Madison's Message of 4th November, 1812, and President Monroe's Message, and other documents stated in Report and Resolves of Massachusetts, 15th February, 1830.

³ See *Vanderheyden v. Young*, 11 Johns. R. 150; Rawle on the Constitution, ch. 13, pp. 155 to 160; *Duffield v. Smith*, 3 Sergeant & Rawle, 590.

(a) The case on behalf of those States will be found very fully presented in Dwight's History of the Hartford Convention, p. 237 *et seq.* The first objection taken to the order of the President to call out the militia was that it did not show that one of the emergencies existed which, under the Constitution, empowered the President to issue the order, that is to say, that they were required to *execute the laws of the Union, suppress insurrections, or repel invasions, or that the United States were in imminent danger of invasion*; and when this objection was obviated by a further order, the one mentioned in the text was taken and insisted upon. In consequence, although the militia was ordered out for State defence, yet as they were not placed under the orders of the federal authorities, the government refused to assume the expense.

When the late civil war broke out, and the President issued his call for 75,000 militia, apportioned among the several States which had not declared their secession, the governors of several of the border States responded with either a peremptory or a qualified refusal. The governors of Virginia, North Carolina, Kentucky, Tennessee, Missouri, and Arkansas refused in the most positive, and some of them in insulting terms; and upon

the ground, either expressly stated or implied, that the call was unconstitutional because made for the purpose of coercing or subjugating the States, which the government had no authority to do. Of these governors it is to be said, that five fully sympathized with the rebellion, and that the sixth, when insurgent forces had invaded the State, vetoed a resolution of the legislature by which he was requested to order them to leave its territory. The governor of Maryland ordered out the troops, stating in his proclamation that they would be detailed to serve within the State or for the defence of the national capital. The governor of Delaware issued a proclamation recommending the formation of volunteer companies for the defence of the lives and property of the people of the State, but not to be subject to be ordered into the service of the United States. This action would probably not be a precedent on any future occasion, and must be referred to the peculiar condition of things then existing, and the divided feeling then prevailing in that portion of the country. In general, in all that portion of the country in which the national authority was sustained, a ready obedience was rendered to the orders of the executive. C.

§ 1211. At a very recent period, the question came before the Supreme Court of the United States for a judicial decision; and it was then unanimously determined, that the authority to decide whether the exigency has arisen belongs exclusively to the President; and that his decision is conclusive upon all other persons.¹ The court said, that this construction necessarily resulted from the nature of the power itself, and from the manifest objects contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and, in such cases, every delay and every obstacle to an efficient and immediate compliance, would necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished, without the means of resistance. If the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are, as it has been emphatically said they are,² natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy, these powers must be so construed, as to the modes of their exercise, as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier. And any act done by any person, in furtherance of such orders, would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Besides, in many instances the evidence upon which the President might decide that there was imminent danger of invasion, might be of a nature not constituting strict technical proof; or the disclosure of the evidence might reveal important state secrets, which the public interest, and even safety, might imperiously demand to

¹ *Luther v. Borden*, 7 Howard, 1.

² *The Federalist*, No. 29.

be kept in concealment.¹ The act of 1795 was manifestly framed upon this reasoning. The President is by it necessarily constituted, in the first instance, the judge of the existence of the exigency, and is bound to act according to his belief of the facts. If he does so act, and decides to call out the militia, his orders for this purpose are in strict conformity to the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot be that it is a correct inference, that any other person has a right to disobey them. No provision is made for an appeal from, or review of, the President's opinion. And whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, the general rule of construction is, that he is thereby constituted the sole and exclusive judge of the existence of those facts.²

§ 1212. It seems to be admitted, that the power to call forth the militia may be exercised either by requisitions upon the executive of the States, or by orders directed to such executive, or to any subordinate officers of the militia. It is not, however, to be understood, that the State executive is in any case bound to leave his executive duties, and go personally into the actual service of the United States.³

§ 1213. The power to govern the militia, when in the actual service of the United States, is denied by no one to be an exclusive one. Indeed, from its very nature, it must be so construed; for the notion of distinct and independent orders from authorities wholly unconnected, would be utterly inconsistent with that unity of command and action, on which the success of all military operations must essentially depend.⁴ But there is nothing in the Constitution which prohibits a State from calling forth its own militia, not detached into the service of the Union, to aid the United States in executing the laws, in suppressing

¹ *Martin v. Mott*, 12 Wheat. R. 30, 31.

² *Martin v. Mott*, 12 Wheat. R. 19, 31, 32. (a)

³ See *Houston v. Moore*, 5 Wheat. R. 1, 15, 16, and Mr. J. Johnson's Opinion, *Id.* 36, 37, 40, 46.

⁴ The *Federalist*, Nos. 9, 29; *Houston v. Moore*, 5 Wheat. R. 1, 17, 53, 54, 55, 56, 61, 62.

(a) Approved in *Luther v. Borden*, 7 How. 44.

insurrections, and in repelling invasions. (a) Such a concurrent exercise of power in no degree interferes with, or obstructs the exercise of, the powers of the Union. Congress may, by suitable laws, provide for the calling forth of the militia, and annex suitable penalties to disobedience of their orders, and direct the manner in which the delinquents may be tried. But the authority to call forth, and the authority exclusively to govern, are quite distinct in their nature. The question, when the authority of Congress over the militia becomes exclusive, must essentially depend upon the fact, when they are to be deemed in the actual service of the United States. There is a clear distinction between calling forth the militia, and their being in actual service. These are not contemporaneous acts, nor necessarily identical in their constitutional bearings. The President is not commander-in-chief of the militia, except when in actual service; and not, when they are merely ordered into service. They are subjected to martial law only, when in actual service, and not merely when called forth, before they have obeyed the call. The act of 1795 and other acts on this subject manifestly contemplate and recognize this distinction. To bring the militia within the meaning of being in actual service, there must be an obedience to the call, and some acts of organization, mustering, rendezvous, or marching, done in obedience to the call, in the public service.¹

§ 1214. But whether the power is exclusive in Congress to punish delinquencies in not obeying the call on the militia, by their own courts-martial, has been a question much discussed, and upon which no inconsiderable contrariety of opinion has been expressed. That it may, by law, be made exclusive, is not denied. But if no such law be made, whether a State may not, by its own laws, constitute courts-martial to try and punish the delinquencies, and inflict the penalties prescribed by the act of Congress, has been the point in controversy. It is now settled that, under such circumstances, a State court-martial may constitutionally take cognizance of, and inflict the punishment. But a State cannot add to, or vary the punishments inflicted by the acts of Congress upon the delinquents.²

¹ *Houston v. Moore*, 5 Wheat. R. 1, 17, 18, 20, 53, 60, 61, 63, 64; Rawle on Const. ch. 13, p. 159.

² *Houston v. Moore*, 5 Wheat. R. 1, 2, 3, 24, 28, 44, 69 to 75; Rawle on Const. ch.

(a) *Luther v. Borden*, 7 How. 1.

§ 1215. A question of another sort was also made during the late war with Great Britain; whether the militia, called into the actual service of the United States, were to be governed and commanded by any officer but of the same militia, except the President of the United States; in other words, whether the President could delegate any other officer of the regular army, of equal or superior rank, to command the militia in his absence. It was held in several of the eastern States, that the militia were exclusively under the command of their own officers, subject to the personal orders of the President; and that he could not authorize any officer of the army of the United States to command them in his absence, nor place them under the command of any such officer.¹ This doctrine was deemed inadmissible by the functionaries of the United States. It has never yet been settled by any definite judgment of any tribunal competent to decide it.² If, however, the doctrine can be maintained, it is obvious that the public service must be continually liable to very great embarrassments in all cases where the militia are called into the public service in connection with the regular troops. (a)

13, pp. 158, 159; *Houston v. Moore*, 3 Serg. & Rawle, 169; *Duffield v. Smith*, 3 Serg. & R. 590; 1 Kent's Comm. Lect. 12, pp. 248, 249, 250; Serg. on Const. ch. 28 [ch. 30]; *Meade's Case*, 5 Hall's Law Journ. 536; *Bolton's Case*, 3 Serg. & Rawle, 176, note.

¹ 8 Mass. Rep. Supp. 549, 550; 5 Hall's Amer. Law Journ. 495; 1 Kent's Comm. Lect. 12, pp. 244 to 247.

² 1 Kent's Comm. Lect. 12, pp. 244 to 247.

(a) This doctrine may be considered as practically given up. See an account of the proceedings in the case of Massachusetts and Connecticut in Dwight's History of the Hartford Convention, pp. 249 *et seq.* During the late civil war, when State troops were called out, they

came with the appropriate officers for the bodies called for, but were placed at once subject to the orders of some superior federal officer, and in no instance was there a refusal to obey orders on any such ground as was taken in 1812.

CHAPTER XXIII.

POWER OVER SEAT OF GOVERNMENT AND OTHER CEDED PLACES.

§ 1216. THE next power of Congress is, "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular States and the acceptance of Congress, become the SEAT OF THE GOVERNMENT of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of FORTS, MAGAZINES, ARSENALS, DOCK-YARDS, and other needful BUILDINGS."

§ 1217. This clause was not in the original draft of the Constitution; but was referred to a committee, who reported in its favor; and it was adopted into the Constitution with a slight amendment, without any apparent objection.¹

§ 1218. The indispensable necessity of complete and exclusive power, on the part of the Congress, at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, and one might say of the world, by virtue of its general supremacy. Without it, not only the public authorities might be insulted, and their proceedings be interrupted with impunity; but the public archives might be in danger of violation and destruction, and a dependence of the members of the national government on the State authorities for protection in the discharge of their functions be created, which would bring on the national councils the imputation of being subjected to undue awe and influence, and might, in times of high excitement, expose their lives to jeopardy. It never could be safe to leave in possession of any State the exclusive power to decide, whether the functionaries of the national government should have the moral or physical power to perform their duties.² It might subject the favored State to the most unrelenting jeal-

¹ Journ. of Convention, 222, 260, 328, 329, 358.

² The Federalist, No. 43; 2 Elliot's Debates, 92, 321, 322, 326.

ousy of the other States, and introduce earnest controversies from time to time respecting the removal of the seat of government.

§ 1219. Nor can the cession be justly an object of jealousy to any State; or in the slightest degree impair its sovereignty. The ceded district is of a very narrow extent; and it rests in the option of the State whether it shall be made or not. There can be little doubt, that the inhabitants composing it would receive with thankfulness such a blessing, since their own importance would be thereby increased, their interests be subserved, and their rights be under the immediate protection of the representatives of the whole Union.¹ It is not improbable, that an occurrence, at the very close of the revolutionary war, had a great effect in introducing this provision into the Constitution. At the period alluded to, the Congress, then sitting at Philadelphia, was surrounded and insulted by a small, but insolent body of mutineers of the continental army. Congress applied to the executive authority of Pennsylvania for defence; but, under the ill-conceived constitution of the State at that time, the executive power was vested in a council consisting of thirteen members; and they possessed or exhibited so little energy, and such apparent intimidation, that Congress indignantly removed to New Jersey, whose inhabitants welcomed them with promises of defending them. Congress remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, they adjourned to Annapolis. The general dissatisfaction with the proceedings of Pennsylvania, and the degrading spectacle of a fugitive Congress, were sufficiently striking to produce this remedy.² Indeed, if such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence, as it would have been offensive to their honor.

§ 1220. And yet this clause did not escape the common fate of most of the powers of the national government. It was represented as peculiarly dangerous. It may, it was said, become a sort of public sanctuary, with exclusive privileges and immunities of every sort. It may be the very spot for the establishment of tyranny, and of refuge of the oppressors of the people. The inhabitants will be answerable to no laws, except those of Congress. A powerful army may be here kept on foot; and the

¹ The Federalist, No. 43; 2 Elliot's Deb. 92, 321, 322, 326, 327.

² Rawle on Const. ch. 9, pp. 112, 113.

most oppressive and sanguinary laws may be passed to govern the district.¹ Nay, at the distance of fourteen years after the Constitution had quietly gone into operation, and this power had been acted upon with a moderation as commendable as it ought to be satisfactory, a learned commentator expressed regret at the extent of the power, and intimated in no inexplicit terms his fears for the future. "A system of laws," says he, "incompatible with the nature and principles of a representative democracy, though not likely to be introduced at once, may be matured by degrees, and diffuse its influence through the States, and finally lay the foundation of the most important changes in the nature of the federal government. Let foreigners be enabled to hold lands, and transmit them by inheritance, or devise; let the preference to males, and the rights of primogeniture be revived with the doctrine of entails; and aristocracy will neither want a ladder to climb by, nor a base for its support."²

§ 1221. What a superstructure to be erected on such a narrow foundation! Several of the States now permit foreigners to hold and transmit lands; and yet their liberties are not overwhelmed. The whole South, before the revolution, allowed and cherished the system of primogeniture; and yet they possessed, and transmitted to their children their colonial rights and privileges, and achieved under this very system the independence of the country. The system of entails is still the law of several of the States; and yet no danger has yet assailed them. They possess and enjoy the fruits of republican industry and frugality, without any landed or other aristocracy. And yet the petty district of ten miles square is to overrule in its policy and legislation all that is venerable and admirable in State legislation. The States and the people of the States are represented in Congress. The district has no representatives there; but is subjected to the exclusive legislation of the former. And yet Congress, at home republican, will here nourish aristocracy. The States will here lay the foundation for the destruction of their own institutions, rights, and sovereignty. At home, they will follow the legisla-

¹ 2 Elliot's Debates, 320, 321, 323, 324, 325, 326; Id. 115. Amendments limiting the power of Congress to such regulations, as respect the police and good government of the district, were proposed by several of the States at the time of the adoption of the Constitution. But they have been silently abandoned. 1 Tuck. Black. Comm. App. 276, 374.

² 1 Tuck. Black. Comm. App. 277.

tion of the district, instead of guiding it by their precept and example. They will choose to be the engines of tyranny and oppression in the district, that they may become enslaved within their own territorial sovereignty. What, but a disposition to indulge in all sorts of delusions and alarms, could create such extraordinary flights of imagination? Can such things be, and overcome us, like a summer's cloud, without our special wonder? At this distance of time, it seems wholly unnecessary to refute the suggestions which have been so ingeniously urged. If they prove anything, they prove, that there ought to be no government, because no persons can be found worthy of the trust.

§ 1222. The seat of government has now, for more than thirty years, been permanently fixed on the river Potomac, on a tract of ten miles square, ceded by the States of Virginia and Maryland. It was selected by that great man, the boast of all America, the first in war, the first in peace, and the first in the hearts of his countrymen. It bears his name; it is the monument of his fame and wisdom. May it be for ever consecrated to its present noble purpose, *capitoli immobile saxum*!

§ 1223. The inhabitants enjoy all their civil, religious, and political rights. They live substantially under the same laws as at the time of the cession, such changes only having been made as have been devised and sought by themselves. They are not indeed citizens of any State, entitled to the privileges of such; but they are citizens of the United States. They have no immediate representatives in Congress. But they may justly boast, that they live under a paternal government, attentive to their wants, and zealous for their welfare. They, as yet, possess no local legislature; and have, as yet, not desired to possess one. A learned commentator has doubted, whether Congress can create such a legislature, because it is the delegation of a delegated authority.¹ A very different opinion was expressed by the Federalist; for it was said, that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them."²(a) In point of fact, the corporations of the three cities within its limits possess and exercise a delegated power of legislation under their charters, granted by Con-

¹ 1 Tuck. Black. Comm. App. 278.

² The Federalist, No. 43.

(a) It was allowed them in the year 1871, a territorial government having been provided for them, with the right to a delegate in Congress.

gress, to the full extent of their municipal wants, without any constitutional scruple, or surmise, or doubt.

§ 1224. The other part of the power, giving exclusive legislation over places ceded for the erection of forts, magazines, &c., seems still more necessary for the public convenience and safety. The public money expended on such places, and public property deposited in them, and the nature of the military duties which may be required there, all demand that they should be exempted from State authority. In truth, it would be wholly improper, that places, on which the security of the entire Union may depend, should be subjected to the control of any member of it. The power, indeed, is wholly unexceptionable; since it can only be exercised at the will of the State; and therefore it is placed beyond all reasonable scruple.¹ Yet, it did not escape without the scrutinizing jealousy of the opponents of the Constitution, and was denounced, as dangerous to State sovereignty.²

§ 1225. A great variety of cessions have been made by the States under this power. And generally there has been a reservation of the right to serve all State process, civil and criminal, upon persons found therein. This reservation has not been thought at all inconsistent with the provision of the Constitution; for the State process, *quoad hoc*, becomes the process of the United States, and the general power of exclusive legislation remains with Congress. Thus, these places are not capable of being made a sanctuary for fugitives, to exempt them from acts done within, and cognizable by, the States to which the territory belonged; and at the same time Congress is enabled to accomplish the great objects of the power.³

§ 1226. The power of Congress to exercise exclusive jurisdiction over these ceded places is conferred on that body, as the legislature of the Union; and cannot be exercised in any other character. A law passed in pursuance of it is the supreme law of the land, and binding on all the States, and cannot be defeated by them. The power to pass such a law carries with it all the incidental powers to give it complete and effectual execution;

¹ The Federalist, No. 43. See also *United States v. Bevans*, 3 Wheat. R. 336, 388.

² 2 Elliot's Debates, 145.

³ *Commonwealth v. Clary*, 8 Mass. R. 72; *United States v. Cornell*, 2 Mason, R. 60; *Rawle on Constitution*, ch. 27, p. 238; *Sergeant on Constitution*, ch. 28 [ch. 30]; 1 *Kent's Comm. Lect.* 19, pp. 402 to 404.

and such a law may be extended in its operation incidentally throughout the United States, if Congress think it necessary so to do. But if intended to have efficiency beyond the district, language must be used in the act expressive of such an intention; otherwise it will be deemed purely local.¹

§ 1227. It follows from this review of the clause, that the States cannot take cognizance of any acts done in the ceded places after the cession; and, on the other hand, the inhabitants of those places cease to be inhabitants of the State, and can no longer exercise any civil or political rights under the laws of the State.² (a) But if there has been no cession by the State of the place, although it has been constantly occupied and used, under purchase, or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect.³

§ 1228. Upon a recent occasion, the nature and effect of the exclusive power of legislation, thus given by the Constitution in these ceded places, came under the consideration of the Supreme Court, and was much discussed. It was argued, that all such legislation by Congress was purely local, like that exercised by a territorial legislature; and was not to be deemed legislation by Congress in the character of the legislature of the Union. The object of the argument was to establish, that a law, made in or for such ceded places, had no extraterritorial force or obligation, it not being a law of the United States. The reasoning of the court affirming that such an act was a law of the United States, and that Congress in passing it acted as the legislature of the Union, can be best conveyed in their own language, and would be impaired by an abridgment.

§ 1229. "In the enumeration of the powers of Congress, which is made in the eighth section of the first article, we find that of

¹ *Cohens v. Virginia*, 6 Wheat. R. 264, 424, 425, 426, 427, 428; Sergeant on Constitution, ch. 28 [ch. 30]; 1 Kent's Comm. Lect. 19, pp. 402 to 404; Rawle on Constitution, ch. 27, pp. 238, 239; *Loughborough v. Blake*, 5 Wheat. R. 322, 324.

² 8 Mass. R. 72; 1 Hall's Jour. of Jurisp. 53; 1 Kent's Comm. Lect. 19, pp. 403, 404.

³ *The People v. Godfrey*, 17 Johns. R. 225; *Commonwealth v. Young*, 1 Hall's Journal of Jurisp. 47; 1 Kent's Comm. Lect. 19, pp. 403, 404; Sergeant on Constitution, ch. 28 [ch. 30]; Rawle on Constitution, ch. 27, pp. 238 to 240.

(a) See this very fully considered and the doctrine of the text approved in *Sinks v. Reese*, 19 Ohio St. 306.

exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive legislation. This proposition need not be enforced. The second clause of the sixth article declares, that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land.' The clause, which gives exclusive jurisdiction, is unquestionably a part of the Constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by, Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

§ 1230. "One of the gentlemen sought to illustrate his proposition, that Congress, when legislating for the district, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is, they say, a court of common law, and a court of equity. Its character, when sitting as a court of common law, is as distinct from its character when sitting as a court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other. Without inquiring, how far the union of different characters in one court may be applicable, in principle, to the union in Congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity, that a mere inspection of the record gives decisive information of the character in which the court sits, and consequently

of the extent of its powers. But if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

§ 1231. "Since Congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire, whether there be anything in the nature of this exclusive legislation, which necessarily confines the operation of the laws, made in virtue of this power, to the place with a view to which they are made. Connected with the power to legislate within this district, is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus Congress legislates in the same act, under its exclusive and its limited powers.

§ 1232. "The act proceeds to direct, that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered. Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which Congress acts, when exercising its powers of exclusive legislation. If Congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed; if its general powers cannot come in aid of these local powers, how can the offence be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body? Were any one State of the Union to pass a law for trying a criminal in a court

not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If Congress be not equally incompetent, it is, because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or, because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual; and the incidental power may be exercised throughout the Union, because the principal power is given to that body, as the legislature of the Union.

§ 1233. "So, in the same act, a person, who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dock-yard, magazine, or other place, or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, &c., he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, &c. It is clear, that Congress cannot punish felonies generally; and, of consequence, cannot punish misprision of felony. It is equally clear, that a State legislature, the State of Maryland, for example, cannot punish those, who, in another State, conceal a felony committed in Maryland. How, then, is it, that Congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?

§ 1234. "The solution, and the only solution of the difficulty, is, that the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the State in which the act has been committed, the government cannot pursue him into another State, and apprehend him there; but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort, or other place, in which the offence might be committed, then this principle would apply to them, as to other local legislatures; and the felon, who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know, that the principle does not

apply; and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

§ 1235. "Whether any particular law be designed to operate without the district or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power, so exercised, be incidental to the power of exclusive legislation, and be warranted by the Constitution, requires a consideration of that instrument. In such cases the Constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case."¹

¹ *Cohens v. Virginia*, 6 Wheat. R. 424 to 429.

CHAPTER XXIV.

POWERS OF CONGRESS—INCIDENTAL.

§ 1236. THE next power of Congress is, “to make all laws, which shall be *necessary* and *proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department, or officer thereof.” (a)

§ 1237. Few powers of the government were at the time of the adoption of the Constitution assailed with more severe invective, and more declamatory intemperance, than this.¹ And it has ever since been made a theme of constant attack, and extravagant jealousy.² Yet it is difficult to perceive the grounds upon which it can be maintained, or the logic by which it can be reasoned out. It is only declaratory of a truth, which would have resulted by necessity and unavoidable implication from the very act of establishing the national government, and vesting it with certain powers. What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the *means* necessary to its execution? What is a legislative power, but a power of making laws? What are the means to execute a legislative power, but laws? What is the power, for instance, of laying and collecting taxes, but a legislative power, or a power to make laws to lay and collect taxes? What are the proper means of executing such a power, but necessary and proper laws? In truth, the constitutional operation of the government would be precisely the same, if the clause were obliterated, as if it were repeated in every article.³ It would otherwise result, that the power could never be exercised; that

¹ The Federalist, Nos. 33, 44 ; 1 Elliot's Deb. 293, 294, 300 ; 2 Elliot's Deb. 196, 342.

² 1 Tuck. Black. Comm. App. 286, 287 ; 4 Elliot's Deb. 216, 217, 224, 225.

³ The Federalist, No. 33 ; 2 Elliot's Debates, 196 ; Hamilton on Bank, 1 Hamilton's Works, 121 ; *McCulloch v. Maryland*, 4 Wheat. R. 419.

(a) See *Ex parte Curtis*, 106 U. S. 371, “contributions” from employees of the holding constitutional, legislation against government.

is, the end would be required, and yet no means allowed. This would be a perfect absurdity. It would be to create powers, and compel them to remain forever in a torpid, dormant, and paralytic state. It cannot, therefore, be denied, that the powers given by the Constitution imply the ordinary means of execution;¹ for without the substance of the power the Constitution would be a dead letter. Those who object to the article must therefore object to the form, or the language of the provision. Let us see if any better could be devised.²

§ 1238. There are four possible methods which the convention might have adopted on this subject. First, they might have copied the second article of the confederation, which would have prohibited the exercise of any power not *expressly* delegated. If they had done so the Constitution would have been construed with so much rigor, as to disarm it of all real authority; or with so much latitude, as altogether to destroy the force of the restriction. It is obvious, that no important power delegated by the confederation was, or indeed could be, executed by Congress, without recurring more or less to the doctrine of construction or implication.³ It had, for instance, power to establish courts for the trial of prizes and piracies, to borrow money, and emit bills of credit. But how could these powers be put in operation without some other implied powers and means? The truth is, that, under the confederation, Congress was from this very clause driven to the distressing alternative, either to violate the articles by a broad latitude of construction, or to suffer the powers of the government to remain prostrate, and the public service to be wholly neglected. It is notorious, that they adopted, and were compelled to adopt the former course; and the country bore them out in what might be deemed an usurpation of authority.⁴ The past experience of the country was, therefore, decisive against any such restriction. It was either useless or mischievous.⁵

§ 1239. Secondly. The convention might have attempted a positive enumeration of the powers comprehended under the terms *necessary*, and *proper*. The attempt would have involved a com-

¹ M'Culloch v. Maryland, 4 Wheat. R. 409; 4 Elliot's Debates, 217, 218, 220, 221.

² The Federalist, No. 44. See also President Monroe's Exposition and Message, 4th of May, 1822, p. 47; 3 Elliot's Deb. 318.

³ The Federalist, No. 44.

⁴ See the Federalist, Nos. 38, 44; 4 Wheat. R. 423; 4 Elliot's Deb. 218, 219.

⁵ M'Culloch v. Maryland, 4 Wheat. R. 406, 407, 423.

plete digest of laws on every subject to which the Constitution relates. It must have embraced all future, as well as all present exigencies, and been accommodated to all times, and all occasions, and all changes of national situation and character. Every new application of the general power must have been foreseen and specified; for the particular powers, which are the means of attaining the objects of the general power, must, necessarily, vary with those objects; and be often properly varied, when the objects remain the same.¹ Who does not at once perceive, that such a course is utterly beyond human reach and foresight?² It demands a wisdom never yet given to man; and a knowledge of the future, which belongs only to Him whose providence directs and governs all.

§ 1240. Thirdly. The convention might have attempted a negative enumeration of the powers, by specifying the powers which should be excepted from the general grant. It will be at once perceived, that this task would have been equally chimerical with the foregoing; and would have involved this additional objection, that in such a case, every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions, and described the residue by the general terms, "not necessary or proper," it must have happened, that the enumeration would comprehend a few exceptions only, and those only which were most prominent, and therefore the least likely to be abused; and that others would be less forcibly excepted under the residuary clause, than if there had not been any partial enumeration of exceptions.³

§ 1241. Fourthly. The convention might have been wholly silent on this head; and then, as has been already seen, the auxiliary powers, or means to carry into execution the general powers, would have resulted to the government by necessary implication; for wherever the end is required, the means are authorized; and wherever a general power to do a thing is given, every particular power necessary for doing it, is included. If this last course had been adopted, every objection, now urged

¹ The Federalist, No. 44; 2 Elliot's Deb. 223.

² *M'Culloch v. Maryland*, 4 Wheat. R. 407; 4 Elliot's Deb. 223, 224; *Anderson v. Dunn*, 6 Wheat. R. 204, 225, 226.

³ The Federalist, No. 44.

against the clause, would have remained in full force; and the omission might have been made in critical periods a ground to assail the essential powers of the Union.¹

§ 1242. If, then, the clause imports no more than would result from necessary implication it may be asked why it was inserted at all. The true answer is, that such a clause was peculiarly useful in order to avoid any doubt which ingenuity or jealousy might raise upon the subject. Much plausible reasoning might be employed, by those who were hostile to the Union and in favor of State power, to prejudice the people on such a subject, and to embarrass the government in all its reasonable operations. Besides, as the confederation contained a positive clause, restraining the authority of Congress to powers expressly granted, there was a fitness in declaring that that rule of interpretation should no longer prevail. The very zeal, indeed, with which the present clause has been always assailed, is the highest proof of its importance and propriety. It has narrowed down the grounds of hostility to the mere interpretation of terms.²

§ 1243. The plain import of the clause is, that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the express powers. (a) It neither enlarges any power specifically granted, nor is it a grant of any new power to Congress; but it is merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.³ Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be *expressed* in the Constitution. If it be, the question is decided. If it be not *expressed*, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.⁴

¹ The Federalist, No. 44.

² The Federalist, Nos. 33, 44.

³ Some few statesmen have contended, that the clause gave further powers than mere incidental powers. But their reasoning does not seem very clear or satisfactory. See Governor Randolph's Remarks, 2 Elliot's Debates, 342; Mr. Gerry's Speech, in February, 1791, 4 Elliot's Debates, 225, 227. These speeches are, however, valuable for some striking views which they present of the propriety of a liberal construction of the words.

⁴ See Virginia Report and Resolutions, Jan. 1800, pp. 33, 34; 1 Tuck. Black.

(a) See *Ec parte* Curtis, 106 U. S. 371.

§ 1244. But still a ground of controversy remains open, as to the true interpretation of the terms of the clause; and it has been contested with no small share of earnestness and vigor. What, then, is the true constitutional sense of the words “necessary and proper” in this clause? It has been insisted, by the advocates of a rigid interpretation, that the word “necessary” is here used in its close and most intense meaning; so that it is equivalent to *absolutely and indispensably necessary*. It has been said, that the Constitution allows only the means which are *necessary*; not those which are merely *convenient* for effecting the enumerated powers. If such a latitude of construction be given to this phrase as to give any non-enumerated power, it will go far to give every one; for there is no one which ingenuity might not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers and reduce the whole to one phrase. Therefore it is that the Constitution has restrained them to the *necessary* means; that is to say, to those means *without which the grant of the power would be nugatory*. A little difference in the degree of convenience cannot constitute the necessity which the Constitution refers to.¹

§ 1245. The effect of this mode of interpretation is, to exclude all choice of means; or, at most, to leave to Congress, in each case, those only which are most direct and simple. If, indeed, such implied powers and such only as can be shown to be indispensably necessary are within the purview of the clause, there will be no end to difficulties, and the express powers must practically become a mere nullity.² It will be found that the operations of the government, upon any of its powers, will rarely admit of a rigid demonstration of the necessity (in this strict sense) of the particular means. In most cases, various systems or means may be resorted to, to attain the same end; and yet, with respect to each, it may be argued that it is not constitutional, because it is not indispensable, and the end may be obtained by other means. The consequence of such reasoning would be,

Comm. App. 287, 288; President Monroe's Exposition and Message, 4th of May, 1822, p. 47; 5 Marshall's Wash. App. note 3; 1 Hamilton's Works, 117, 121.

¹ 4 Jefferson's Corresp. 525, 526; 4 Elliot's Deb. 216, 217, 224, 225, 267; M'Culloch v. Maryland, 4 Wheat. R. 412, 413.

² Hamilton on Bank, 1 Hamilton's Works, 119; 5 Marshall's Wash. App. note 3, p. 9; Mr. Madison, 4 Elliot's Deb. 223.

that, as no means could be shown to be constitutional, none could be adopted.¹(a) For instance, Congress possesses the power to make war and to raise armies, and, incidentally, to erect fortifications, and purchase cannon and ammunition, and other munitions of war. But war may be carried on without fortifications, cannon, and ammunition. No particular kind of arms can be shown to be absolutely necessary; because various sorts of arms, of different convenience, power, and utility, are or may be resorted to, by different nations. What, then, becomes of the power? Congress has power to borrow money, and to provide for the payment of the public debt; yet no particular method is indispensable to these ends. They may be attained by various means. Congress has power to provide a navy; but no particular size, or form, or equipment of ship is indispensable. The means of providing a naval establishment are very various; and the applications of them admit of infinite shades of opinion, as to their convenience, utility, and necessity. What, then, is to be done? Are the powers to remain dormant? Would it not be absurd to say that Congress did not possess the choice of means, under such circumstances, and ought not to be empowered to select and use any means which are, in fact, conducive to the exercise of the powers granted by the Constitution?² Take another example. Congress has, doubtless, the authority, under the power to regulate commerce, to erect light-houses, beacons, buoys, and public piers, and authorize the employment of pilots.³ But it cannot be affirmed that the exercise of these powers is in a strict sense necessary; or that the power to regulate commerce would be nugatory, without establishments of this nature.⁴ In truth, no particular regulation of commerce can ever be shown to be exclusively and indispensably necessary; and thus we should be driven to admit, that all regulations are within the scope of the power, or that none are. If there be any

¹ *United States v. Fisher*, 2 Cranch, 358; *Hamilton on Bank*, 1 *Hamilton's Works*, 119; 5 *Marshall's Wash. note* 3, pp. 9, 10; *Mr. Madison*, 4 *Elliot's Deb.* 223.

² *United States v. Fisher*, 2 Cranch, R. 358.

³ See 4 *Elliot's Debates*, 265, 280.

⁴ *Hamilton on Bank*, 1 *Hamilton's Works*, 120.

(a) *Fisher v. Blight*, 2 Cranch, 358, 396, where this subject is specially commented on.

general principle which is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, it is, that every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the end of such power; unless they are excepted in the Constitution, or are immoral, or are contrary to the essential objects of political society.¹

§ 1246. There is another difficulty in the strict construction above alluded to, that it makes the constitutional authority depend upon casual and temporary circumstances, which may produce a necessity to-day, and change it to-morrow. This alone shows the fallacy of the reasoning. The expediency of exercising a particular power at a particular time must, indeed, depend on circumstances; but the constitutional right of exercising it must be uniform and invariable; the same to-day as to-morrow.²

§ 1247. Neither can the degree in which a measure is necessary, ever be a test of the legal right to adopt it. That must be a matter of opinion (upon which different men and different bodies may form opposite judgments), and can only be a test of expediency. The relation between the measure and the end, between the nature of the means employed towards the execution of a power, and the object of that power, must be the criterion of constitutionality; and not the greater or less of necessity or expediency.³ If the legislature possesses a right of choice as to the means, who can limit that choice? Who is appointed an umpire or arbiter, in cases where a discretion is confided to a government? The very idea of such a controlling authority in the exercise of its powers is a virtual denial of the supremacy of the government in regard to its powers. It repeals the supremacy of the national government, proclaimed in the Constitution.

§ 1248. It is equally certain, that neither the grammatical nor the popular sense of the word "necessary," requires any such construction. According to both, "necessary" often means no more than *needful, requisite, incidental, useful, or conducive to*.

¹ Hamilton on Bank, 1 Hamilton's Works, 112.

² Hamilton on Bank, 1 Hamilton's Works, 117; 5 Marshall's Wash. App. note 3, p. 8.

³ Hamilton on Bank, 1 Hamilton's Works, 119, 120; 5 Marshall's Wash. App. note 3, pp. 9, 10; *M'Culloch v. Maryland*, 4 Wheat. R. 423.

It is a common mode of expression to say, that it is necessary for a government, or a person to do this or that thing, when nothing more is intended or understood, than that the interest of the government or person requires, or will be promoted by the doing of this or that thing. Every one's mind will at once suggest to him many illustrations of the use of the word in this sense.¹ To employ the means necessary to an end, is generally understood, as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.

§ 1249. Such is the character of human language that no word conveys to the mind in all situations one single definite idea; and nothing is more common, than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just interpretation, that many words, which import something excessive, should be understood in a more mitigated sense; in a sense, which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression which the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. It may be little necessary, less necessary, or least necessary. To no mind would the same idea be conveyed by any two of these several phrases. The tenth section of the first article of the Constitution furnishes a strong illustration of this very use of the word. It contains a prohibition upon any State to lay "any imposts or duties, &c., except what may be *absolutely necessary* for executing its inspection laws." No one can compare this clause with the other, on which we are commenting, without being struck with the conviction, that the word "*absolutely*," here prefixed to "necessary," was intended to distinguish it from the sense, in which standing alone, it is used in the other.²

¹ Hamilton on Bank, 1 Hamilton's Works, 118 ; 5 Marshall's Wash. App. note 3, p. 9.

² *M'Culloch v. Maryland*, 4 Wheaton's R. 413 to 415. In this case (4 Wheaton's R. 411 to 425) there is a very elaborate argument of the Supreme Court upon the

§ 1250. That the restrictive interpretation must be abandoned, in regard to certain powers of the government, cannot be reasonably doubted. It is universally conceded, that the power of punishment appertains to sovereignty and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. If, then, the restrictive interpretation must be abandoned, in order to justify the constitutional exercise of the power to punish, whence is the rule derived which would reinstate it, when the government would carry its powers into operation by means not vindictive in their nature? If the word "necessary" means *needful, requisite, essential, conducive to*, to let in the power of punishment, why is it not equally comprehensive, when applied to other means used to facilitate the execution of the powers of the government? ¹

§ 1251. The restrictive interpretation is also contrary to a sound maxim of construction, generally admitted, namely,—that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of the country, such as its finances, its trade, and its defence, ought to be liberally expounded in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcations of the boundaries of its powers; but on the nature and objects of government itself. The means by which national exigencies are provided for, national inconveniences obviated, and national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities intrusted to a government, on principles of liberal construction. ²

§ 1252. It is no valid objection to this doctrine to say, that it is calculated to extend the powers of the government throughout the entire sphere of State legislation. The same thing may be said, and has been said, in regard to every exercise of power by

whole of this subject, a portion of which has been already extracted in the preceding Commentaries, on the rules of interpretation of the Constitution.

¹ M'Culloch v. Maryland, 4 Wheat. R. 418.

² Hamilton on Bank, 1 Hamilton's Works, 120, 121.

implication and construction. There is always some chance of error, or abuse of every power; but this furnishes no ground of objection against the power; and certainly no reason for an adherence to the most rigid construction of its terms, which would at once arrest the whole movements of the government.¹ The remedy for any abuse or misconstruction of the power is the same as in similar abuses and misconstructions of the State governments. It is by an appeal to the other departments of the government; and finally to the people, in the exercise of their elective franchises.²

§ 1253. There are yet other grounds against the restrictive interpretation derived from the language and the character of the provision. The language is, that Congress shall have power "to make all laws which shall be *necessary* and *proper*." If the word "necessary" were used in the strict and rigorous sense contended for, it would be an extraordinary departure from the usual course of the human mind, as exhibited in solemn instruments, to add another word, "proper;" the only possible effect of which is to qualify that strict and rigorous meaning, and to present clearly the idea of a choice of means in the course of legislation.³ If no means can be resorted to but such as are indispensably necessary, there can be neither sense nor utility in adding the other word; for the necessity shuts out from view all consideration of the propriety of the means, as contradistinguished from the former. But if the intention was to use the word "necessary" in its more liberal sense, then there is a peculiar fitness in the other word. It has a sense, at once admonitory and directory. It requires, that the means should be, *bona fide*, appropriate to the end.

§ 1254. The character of the clause equally forbids any presumption of an intention to use the restrictive interpretation. In the first place, the clause is placed among the powers of Congress, and not among the limitations on those powers. In the next place, its terms purport to enlarge, and not to diminish, the powers vested in the government. It purports, on its face, to be an additional power, not a restriction on those already granted.⁴

¹ Hamilton on Bank, 1 Hamilton's Works, 122.

² The Federalist, Nos. 83, 44.

³ M'Culloch v. Maryland, 4 Wheat. R. 418, 419.

⁴ M'Culloch v. Maryland, 4 Wheat. R. 419, 420.

If it does not, in fact (as seems the true construction), give any new powers, it affirms the right to use all necessary and proper means to carry into execution the other powers; and thus makes an *express* power what would otherwise be merely an *implied* power. In either aspect, it is impossible to construe it to be a restriction. If it have any effect, it is to remove the implication of any restriction. If a restriction had been intended, it is impossible that the framers of the Constitution should have concealed it under phraseology, which purports to enlarge, or at least give the most ample scope to the other powers. There was every motive on their part to give point and clearness to every restriction of national power; for they well knew, that the national government would be more endangered in its adoption by its supposed strength, than by its weakness. It is inconceivable, that they should have disguised a restriction upon its powers under the form of a grant of power. They would have sought other terms, and have imposed the restraint by negatives.¹ And what is equally strong, no one, in or out of the State conventions, at the time when the Constitution was put upon its deliverance before the people, ever dreamed of, or suggested, that it contained a restriction of power. The whole argument on each side, of attack and of defence, gave it the positive form of an express power, and not of an express restriction.

§ 1255. Upon the whole, the result of the most careful examination of this clause is, that, if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the national government. The motive for its insertion doubtless was, the desire to remove all possible doubt respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid pageant, or a delusive phantom of sovereignty. Let the end be legitimate; let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument, are constitutional.²

¹ *M'Culloch v. Maryland*, 4 Wheat. R. 420.

² *M'Culloch v. Maryland*, 4 Wheat. R. 420, 421, 423. See also 4 Elliot's Debates,

§ 1256. It may be well, in this connection, to mention another sort of implied power, which has been called with great propriety a resulting power arising from the aggregate powers of the national government. It will not be doubted, for instance, that, if the United States should make a conquest of any of the territories of its neighbors, the national government would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incident of the powers specially enumerated.¹ It may, however, be deemed, if an incident to any, an incident to the power to make war. Other instances of resulting powers will easily suggest themselves. The United States are nowhere declared in the Constitution to be a sovereignty entitled to sue, though jurisdiction is given to the national courts over controversies to which the United States shall be a party. It is a natural incident, resulting from the sovereignty and character of the national government.² So the United States, in their political capacity, have a right to enter into a contract (although it is not expressly provided for by the Constitution), for it is an incident to their general right of sovereignty, so far as it is appropriate to any of the ends of the government, and within the constitutional range of its powers.³ So Congress possess power to punish offences committed on board of the public ships of war of the government by persons not in the military or naval service of the United States, whether they are in port or at sea; for the jurisdiction on board of public ships is everywhere deemed exclusively to belong to the sovereign.⁴

§ 1257. And not only may implied powers, but implied exemptions from State authority exist, although not expressly provided for by law. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are pro-

220, 221, 222, 223, 224, 225; 2 Elliot's Debates, 196, 342; 5 Marsh. Wash. App. No. 3; 2 American Museum, 536; *Anderson v. Dunn*, 6 Wheat. R. 204, 225, 226; *Hamilton on Bank*, 1 Hamilton's Works, 111 to 123.

¹ *Hamilton on Bank*, 1 Hamilton's Works, 115.

² See *Dugan v. United States*, 3 Wheat. R. 173, 179, 180.

³ *United States v. Tingey*, 5 Pet. R. 115.

⁴ *United States v. Bevens*, 3 Wheat. R. 388; *The Exchange*, 7 Cranch, 116.

tected, while in the line of their duty, from State control; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is preserved to them by the judicial department, as a part of its functions.¹ A contractor for supplying a military post with provisions cannot be restrained from making purchases within a State, or from transporting provisions to the place at which troops are stationed. He could not be taxed or fined, or lawfully obstructed in so doing.² These incidents necessarily flow from the supremacy of the powers of the Union, within their legitimate sphere of action.

§ 1258. It would be almost impracticable, if it were not useless, to enumerate the various instances in which Congress, in the progress of the government, have made use of incidental and implied means to execute its powers. They are almost infinitely varied in their ramifications and details. It is proposed, however, to take notice of the principal measures which have been contested, as not within the scope of the powers of Congress, and which may be distinctly traced in the operations of the government and in leading party divisions.³ (a)

¹ *Osborn v. Bank of U. States*, 9 Wheat. R. 365, 366.

² *Osborn v. Bank of U. States*, 9 Wheat. R. 367.

³ Some minor points will be found in the debates collected in 4 Elliot's Debates, 139, 141, 229, 234, 235, 238, 239, 240, 243, 249, 251, 252, 261, 265, 266, 270, 271, 280. There is no express power given by the Constitution to erect forts, or magazines, or lighthouses, or piers, or buoys, or public buildings, or to make surveys of the coast; but they have been constantly deemed incidental to the general powers. Mr. Bayard's Speech, in 1807 (4 Elliot's Debates, 265). Mr. Pickering's Speech, 1817 (4 Elliot's Debates, 280).

(a) The argument upon incidental powers may be said to have been exhausted in the debates in Congress on chartering a National Bank, and other references can be of little value. We

may mention, however, the "Construction Construed" of John Taylor of Caroline, as not unworthy of careful reading in the same connection. C.

CHAPTER XXV.

INCIDENTAL POWERS — NATIONAL BANK.

§ 1259. ONE of the earliest and most important measures which gave rise to a question of constitutional power, was the act chartering the Bank of the United States, in 1791. That question has often since been discussed; and, though the measure has been repeatedly sanctioned by Congress, by the executive, and by the judiciary, and has obtained the like favor in a great majority of the States, yet it is, up to this very hour, still debated upon constitutional grounds, as if it were still new and untried. It is impossible, at this time, to treat it as an open question, unless the Constitution is forever to remain an unsettled text, possessing no permanent attributes, and incapable of having any ascertained sense; varying with every change of doctrine and of party, and delivered over to interminable doubts. If the Constitution is to be only what the administration of the day may wish it to be, and is to assume any and all shapes which may suit the opinions and theories of public men, as they successively direct the public councils, it will be difficult, indeed, to ascertain what its real value is. It cannot possess either certainty, or uniformity, or safety. It will be one thing to-day, and another thing to-morrow, and again another thing on each succeeding day. The past will furnish no guide, and the future no security. It will be the reverse of a law, and entail upon the country the curse of that miserable servitude so much abhorred and denounced, where all is vague and uncertain in the fundamentals of government.

§ 1260. The reasoning upon which the constitutionality of a national bank is denied has been already, in some degree, stated in the preceding remarks. It turns upon the strict interpretation of the clause, giving the auxiliary powers necessary and proper to execute the other enumerated powers. It is to the following effect: The power to incorporate a bank is not among those enumerated in the Constitution. It is known that the very power, thus proposed as a means, was rejected as an end, by the

convention which formed the Constitution. A proposition was made in that body to authorize Congress to open canals, and an amendatory one to empower them to create corporations. But the whole was rejected; and one of the reasons of the rejection urged in debate was, that they then would have a power to create a bank, which would render the great cities, where there were prejudices and jealousies on that subject, adverse to the adoption of the Constitution.¹ In the next place, all the enumerated powers can be carried into execution without a bank. A bank, therefore, is not *necessary*, and consequently not authorized, by this clause of the Constitution. It is urged, that a bank will give great facility or convenience to the collection of taxes. If this were true, yet the Constitution allows only the means which are *necessary*, and not merely those which are *convenient* for effecting the enumerated powers. If such a latitude of construction were allowed as to consider convenience as justifying the use of such means, it would swallow up all the enumerated powers.² Therefore, the Constitution restrains Congress to those means without which the power would be nugatory.³

§ 1261. Nor can its convenience be satisfactorily established. Bank-bills may be a more convenient vehicle than treasury orders, for the purposes of that department. But a little difference in the degree of convenience cannot constitute the necessity contemplated by the Constitution. Besides, the local and State banks now in existence are competent, and would be willing to undertake all the agency required for those very purposes by the government. And if they are able and willing, this establishes clearly, that there can be no necessity for establishing a national bank.⁴ If there would ever be a superior conveniency in a national bank, it does not follow that there exists a power to establish it, or that the business of the country cannot go on very well without it. Can it be thought, that the Constitution intended, that for a shade or two of convenience more or less, Congress should be authorized to break down the most ancient and fundamental laws of the States, such as those against mortmain, the laws of alienage, the rules of descent, the acts of distribution, the laws of

¹ 4 Jefferson's Correspondence, 523, 526; Id. 506.

² 4 Jefferson's Correspondence, 506; 4 Elliot's Debates, 219.

³ 4 Jefferson's Correspondence, 523, 525, 526; 5 Marsh. Wash. App. note 3.

⁴ Ibid.; 4 Elliot's Debates, 220.

escheat and forfeiture, and the laws of monopoly? Nothing but a necessity invincible by any other means can justify such a prostration of laws, which constitute the pillars of our whole system of jurisprudence.¹ If Congress have the power to create one corporation, they may create all sorts; for the power is nowhere limited; and may even establish monopolies.² Indeed this very charter is a monopoly.³

§ 1262. The reasoning by which the constitutionality of the national bank has been sustained is contained in the following summary. The powers confided to the national government are unquestionably, so far as they exist, sovereign and supreme.⁴ It is not, and cannot be disputed, that the power of creating a corporation is one belonging to sovereignty. But so are all other legislative powers; for the original power of giving the law on any subject whatever is a sovereign power. If the national government cannot create a corporation, because it is an exercise of sovereign power, neither can it, for the same reason, exercise any other legislative power.⁵ This consideration alone ought to put an end to the abstract inquiry, whether the national government has power to erect a corporation, that is, to give a legal or artificial capacity to one or more persons, distinct from the natural capacity.⁶ For, if it be an incident to sovereignty, and it is not prohibited, it must belong to the national government in relation to the objects intrusted to it. The true difference is this: where the authority of a government is general, it can create corporations in all cases; where it is confined to certain branches of legislation, it can create corporations only as to those cases.⁷ It cannot be denied, that implied powers may be delegated, as well as express. It follows, that a power to erect corporations may as well be implied as any other thing, if it be an instrument or means of carrying into execution any specified power. The only question in any case must be, whether it be such an instrument or means, and have a natural relation to any of the acknowledged objects of

¹ 4 Jefferson's Correspondence, 523, 526, 527; 5 Marsh. Wash. App. note 3; 1 Hamilton's Works, 130.

² 4 Elliot's Debates, 217, 219, 224, 225.

³ 4 Elliot's Debates, 219, 220, 223.

⁴ Hamilton on Bank, 1 Hamilton's Works, 113; 4 Wheat. R. 405, 406, 409, 410.

⁵ M'Culloch v. Maryland, 4 Wheat. R. 409.

⁶ Hamilton on Bank, 1 Hamilton's Works, 113, 114, 124.

⁷ Hamilton on Bank, 1 Hamilton's Works, 113, 114, 131.

government. Thus, Congress may not erect a corporation for superintending the police of the city of Philadelphia, because they have no authority to regulate the police of that city. But if they possessed the authority to regulate the police of such city, they might, unquestionably, create a corporation for that purpose, because it is incident to the sovereign legislative power to regulate a thing, to employ all the means, which relate to its regulation, to the best and greatest advantage.¹

§ 1263. A strange fallacy has crept into the reasoning on this subject. It has been supposed, that a corporation is some great, independent thing; and that the power to erect it is a great substantive, independent power; whereas, in truth, a corporation is but a legal capacity, quality, or means to an end; and the power to erect it is, or may be, an implied and incidental power. A corporation is never the end for which other powers are exercised; but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation; but a corporation is created to administer the charity. No seminary of learning is instituted in order to be incorporated; but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated; but it is incorporated as affording the best means of being well governed. So a mercantile company is formed with a certain capital for carrying on a particular branch of business. Here, the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary means. If an incorporation is added to the association, it only gives it a new quality, an artificial capacity, by which it is enabled to prosecute the business with more convenience and safety. In truth, the power of creating a corporation is never used for its own sake; but for the purpose of effecting something else. So that there is not a shadow of reason to say, that it may not pass as an incident to powers expressly given, as a mode of executing them.²

§ 1264. It is true, that among the enumerated powers we do not find that of establishing a bank, or creating a corporation. But we do find there the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct

¹ Hamilton on Bank, 1 Hamilton's Works, 115, 116, 130, 131, 136.

² M'Culloch v. Maryland, 4 Wheat. R. 411; Hamilton on Bank, 1 Hamilton's Works, 116, 117, 136.

war; and to raise and support armies and navies. Now, if a bank be a fit means to execute any or all of these powers, it is just as much implied, as any other means. If it be "necessary and proper" for any of them, how is it possible to deny the authority to create it for such purposes?¹ There is no more propriety in giving this power in *express* terms, than in giving any other incidental powers or means in express terms. If it had been intended to grant this power generally, and to make it a distinct and independent power, having no relation to, but reaching beyond the other enumerated powers, there would then have been a propriety in giving it in express terms, for otherwise it would not exist. Thus, it was proposed in the convention to give a general power "to grant charters of incorporation;" — to "grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent;"² — and "to grant letters of incorporation for canals, &c."³ If either of these propositions had been adopted, there would have been an obvious propriety in giving the power in express terms; because, as to the two former, the power was general and unlimited, and reaching far beyond any of the other enumerated powers; and as to the latter, it might be far more extensive than any incident to the other enumerated powers.⁴ But the rejection of these propositions does not prove that Congress in no case, as an incident to the enumerated powers, should erect a corporation; but only, that they should not have a substantive, independent power to erect corporations beyond those powers.

§ 1265. Indeed, it is most manifest, that it never could have been contemplated by the convention, that Congress should, in no case, possess the power to erect a corporation. What otherwise would become of the territorial governments, all of which are corporations created by Congress? There is nowhere an express power given to Congress to erect them. But under the confederation, Congress did provide for their erection, as a resulting

¹ *M'Culloch v. Maryland*, 4 Wheat. R. 406, 407, 408, 409, 410, 411.

² *Journal of Convention*, p. 260.

³ *Journal of Convention*, p. 376. In the first Congress of 1789, when the amendments proposed by Congress were before the House of Representatives for consideration, Mr. Gerry moved to add a clause, "That Congress erect no company of merchants with exclusive advantages of commerce." The proposition was negatived. 2 Lloyd's Deb. 257.

⁴ *M'Culloch v. Maryland*, 4 Wheat. R. 421, 422.

and implied right of sovereignty, by the celebrated ordinance of 1787; and Congress, under the Constitution, have ever since, without question, and with the universal approbation of the nation, from time to time created territorial governments. Yet Congress derive this power only by implication, or as necessary and proper to carry into effect the express power to regulate the territories of the United States.¹ In the convention, two propositions were made and referred to a committee at the same time with the propositions already stated respecting granting of charters,—“to dispose of the unappropriated lands of the United States,” and “to institute temporary governments for new States arising therein.” Both these propositions shared the same fate as those respecting charters of incorporation. But what would be thought of the argument, built upon this foundation, that Congress did not possess the power to erect territorial governments, because these propositions were silently abandoned, or annulled in the convention?

§ 1266. This is not the only case in which Congress may erect corporations. Under the power to accept a cession of territory for the seat of government, and to exercise exclusive legislation therein, no one can doubt, that Congress may erect corporations therein; not only public, but private corporations.² They have constantly exercised the power; and it has never yet been breathed that it was unconstitutional. Yet it can be exercised only as an incident to the power of general legislation. And if so, why may it not be exercised, as an incident to any specific power of legislation, if it be a means to attain the objects of such power?

§ 1267. That a national bank is an appropriate means to carry into effect some of the enumerated powers of the government, and that this can be best done by erecting it into a corporation, may be established by the most satisfactory reasoning. It has a relation, more or less direct, to the power of collecting taxes, to that of borrowing money, to that of regulating trade between the States, and to those of raising and maintaining fleets and armies.³ And it may be added, that it has a most important bearing upon

¹ *M'Culloch v. Maryland*, 4 Wheat. R. 422; *Hamilton on Bank*, 1 *Hamilton's Works*, 135, 136.

² *Hamilton on Bank*, 1 *Hamilton's Works*, 128, 129, 135.

³ *Hamilton on Bank*, 1 *Hamilton's Works*, p. 138.

the regulation of currency between the States. It is an instrument which has been usually applied by governments in the administration of their fiscal and financial operations.¹ And in the present times it can hardly require argument to prove, that it is a convenient, a useful, and an essential instrument in the fiscal operations of the government of the United States.² This is so generally admitted by sound and intelligent statesmen, that it would be a waste of time to endeavor to establish the truth by an elaborate survey of the mode in which it touches the administration of all the various branches of the powers of the government.³

¹ Hamilton on Bank, 1 Hamilton's Works, pp. 152, 153.

² *M'Culloch v. Maryland*, 4 Wheat. R. 422, 423.

³ In Mr. Hamilton's celebrated argument on the constitutionality of the Bank of the United States, in February, 1791, there is an admirable exposition of the whole of this branch of the subject. As the document is rare, the following passages are inserted:—

"It is presumed to have been satisfactorily shown, in the course of the preceding observations, 1. That the power of the government, as to the objects intrusted to its management, is, in its nature, sovereign. 2. That the right of erecting corporations is one inherent in, and inseparable from, the idea of sovereign power. 3. That the position, that the government of the United States can exercise no power, but such as is delegated to it by its Constitution, does not militate against this principle. 4. That the word *necessary*, in the general clause, can have no *restrictive* operation, derogating from the force of this principle; indeed, that the degree in which a measure is, or is not necessary, cannot be a *test of constitutional right*, but of expediency only. 5. That the power to erect corporations is not to be considered as an independent and substantive power, but as an incidental and auxiliary one; and was, therefore, more properly left to implication, than expressly granted. 6. That the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to incorporate for purposes *within the sphere of the specified powers*. And lastly, that the right to exercise such a power, in certain cases, is unequivocally granted in the most positive and comprehensive terms. To all of which it only remains to be added, that such a power has actually been exercised in two very eminent instances, namely, in the erection of two governments; one northwest of the river Ohio, and the other southwest; the last, independent of any antecedent compact. And there results a full and complete demonstration, that the secretary of the State and attorney-general are mistaken, when they deny generally the power of the national government to erect corporations.

"It shall now be endeavored to be shown, that there is a power to erect one of the kind proposed by the bill. This will be done by tracing a natural and obvious relation between the institution of a bank, and the objects of several of the enumerated powers of the government; and by showing that, *politically speaking*, it is necessary to the effectual execution of one or more of those powers. In the course of this investigation various instances will be stated, by way of illustration, of a right to erect corporations under those powers. Some preliminary observations may be proper. The proposed bank is to consist of an association of persons for the purpose of creating a joint capital to be employed, chiefly and essentially, in loans. So far the object is

§ 1268. In regard to the suggestion, that a proposition was made, and rejected in the convention, to confer this very power,

not only lawful, but it is the mere exercise of a right which the law allows to every individual. The Bank of New York, which is not incorporated, is an example of such an association. The bill proposes, in addition, that the government shall become a joint proprietor in this undertaking; and that it shall permit the bills of the company, payable on demand, to be receivable in its revenues; and stipulates that it shall not grant privileges, similar to those which are to be allowed to this company, to any others. All this is incontrovertibly within the compass of the discretion of the government. The only question is, whether it had a right to incorporate this company, in order to enable it the more effectually to accomplish ends which are in themselves lawful. To establish such a right, it remains to show the relation of such an institution to one or more of the specified powers of the government. Accordingly, it is affirmed, that it has a relation, more or less direct, to the power of collecting taxes; to that of borrowing money; to that of regulating trade between the States; and to those of raising and maintaining fleets and armies. To the two former the relation may be said to be immediate. And, in the last place, it will be argued, that it is clearly within the provision which authorizes the making of all *needful rules and regulations* concerning the property of the United States, as the same has been practised upon by the government.

“A bank relates to the collection of taxes in two ways. *Indirectly*, by increasing the quantity of circulating medium, and quickening circulation, which facilitates the means of paying; *directly*, by creating a *convenient species* of medium in which they are to be paid. To designate or appoint the money or thing in which taxes are to be paid is not only a proper, but a necessary, *exercise* of the power of collecting them. Accordingly, Congress, in the law concerning the collection of the duties on imposts and tonnage, have provided, that they shall be payable in gold and silver. But while it was an indispensable part of the work to say in what they should be paid, the choice of the specific thing was mere matter of discretion. The payment might have been required in the commodities themselves. Taxes in kind, however ill-judged, are not without precedents even in the United States; or it might have been in the paper-money of the several States, or in the bills of the Bank of North America, New York, and Massachusetts, all or either of them; or it might have been in bills issued under the authority of the United States. No part of this can, it is presumed, be disputed. The appointment, then, of the money or *thing*, in which the taxes are to be paid, is an incident to the power of collection. And among the expedients which may be adopted is that of bills issued under the authority of the United States. Now, the manner of issuing these bills is again matter of discretion. The government might, doubtless, proceed in the following manner: It might provide that they should be issued under the direction of certain officers, payable on demand; and in order to support their credit, and give them a ready circulation, it might, besides giving them a currency in its taxes, set apart, out of any moneys in its treasury, a given sum, and appropriate it, under the direction of those officers, as a fund for answering the bills as presented for payment.

“The constitutionality of all this would not admit of a question, and yet it would amount to the institution of a bank, with a view to the more convenient collection of taxes. For the simplest and most precise idea of a bank is, a deposit of coin or other property, as a fund for *circulating a credit* upon it, which is to answer the purpose of money. That such an arrangement would be equivalent to the establishment of a

what was the precise nature or extent of this proposition, or what were the reasons for refusing it, cannot now be ascertained by

bank, would become obvious, if the place where the fund to be set apart was kept, should be made a receptacle of the moneys of all other persons, who should incline to deposit them there for safe-keeping ; and would become still more so if the officers, charged with the direction of the fund, were authorized to make discounts at the usual rate of interest, upon good security. To deny the power of the government to add this ingredient to the plan, would be to refine away all government. A further process will still more clearly illustrate the point. Suppose, when the species of bank which has been described was about to be instituted, it were to be urged, that in order to secure to it a due degree of confidence, the fund ought not only to be set apart and appropriated generally, but ought to be specifically vested in the officers who were to have the direction of it, and in their successors in office, to the end, that it might acquire the character of *private property*, incapable of being resumed without a violation of the sanction by which the rights of property are protected, and occasioning more serious and general alarm, the apprehension of which might operate as a check upon the government. Such a proposition might be opposed by arguments against the expediency of it, or the solidity of the reason assigned for it, but it is not conceivable, what could be urged against its constitutionality. And yet such a disposition of the thing would amount to the erection of a corporation ; for the true definition of a corporation seems to be this : It is a *legal* person, or a person created by act of law ; consisting of one or more natural persons, authorized to hold property or a franchise in succession, in a legal as contradistinguished from a natural capacity. Let the illustration proceed a step further. Suppose a bank, of the nature which has been described, without or with incorporation, had been instituted, and that experience had evinced, as it probably would, that being wholly under a public direction it possessed not the confidence requisite to the credit of its bills. Suppose, also, that by some of those adverse conjunctures which occasionally attend nations, there had been a very great drain of the specie of the country, so as not only to cause general distress for want of an adequate medium of circulation ; but to produce, in consequence of that circumstance, considerable defalcations in the public revenues. Suppose, also, that there was no bank instituted in any State ; in such a posture of things, would it not be most manifest, that the incorporation of a bank, like that proposed by the bill, would be a measure immediately relative to the effectual collection of the taxes, and completely within the province of a sovereign power of providing, by all laws necessary and proper, for that collection.

“ If it be said, that such a state of things would render that necessary, and therefore constitutional, which is not so now ; the answer to this (and a solid one it doubtless is) must still be, that which has been already stated ; circumstances may affect the *expediency* of the measure, but they can neither add to, nor diminish its *constitutionality*. A bank has a direct relation to the power of borrowing money, because it is a usual, and, in sudden emergencies, an essential instrument, in the obtaining of loans to government. A nation is threatened with a war ; large sums are wanted on a sudden to make the requisite preparations ; taxes are laid for the purpose ; but it requires time to obtain the benefit of them ; anticipation is indispensable. If there be a bank, the supply can at once be had ; if there be none, loans from individuals must be sought. The progress of these is often too slow for the exigency ; in some situations, they are not practicable at all. Frequently, when they are, it is of great consequence to be able to anticipate the product of them by advances from a bank.

any authentic document, or even by any accurate recollection of the members. As far as any document exists, it specifies only

The essentiality of such an institution, as an instrument of loans, is exemplified at this very moment. An Indian expedition is to be prosecuted. The only fund, out of which the money can arise consistently with the public engagements, is a tax, which only begins to be collected in July next. The preparations, however, are instantly to be made. The money must, therefore, be borrowed; and of whom could it be borrowed, if there were no public banks? It happens, that there are institutions of this kind; but if there were none, it would be indispensable to create one. Let it then be supposed, that the necessity existed (as but for a casualty would be the case), that proposals were made for obtaining a loan; that a number of individuals came forward and said, We are willing to accommodate the government with this money; with what we have in hand, and the credit we can raise upon it, we doubt not of being able to furnish the sum required. But in order to this, it is indispensable that we should be incorporated as a bank. This is essential towards putting it in our power to do what is desired, and we are obliged, on that account, to make it the *consideration* or *condition* of the loan. Can it be believed that a compliance with this proposition would be unconstitutional? Does not this alone evince the contrary? It is a necessary part of a power to borrow to be able to stipulate the considerations or conditions of a loan. It is evident, as has been remarked elsewhere, that this is not confined to the mere stipulation of a franchise. If it may (and it is not perceived why it may not), then the grant of a corporate capacity may be stipulated, as a consideration of the loan. There seems to be nothing unfit, or foreign from the nature of the thing, in giving individuality, or a corporate capacity, to a number of persons, who are willing to lend a sum of money to the government, the better to enable them to do it, and make them an ordinary instrument of loans in future emergencies of state.

“But the more general view of the subject is still more satisfactory. The legislative power of borrowing money, and of making all laws necessary and proper for carrying into execution that power, seems obviously competent to the appointment of the *organ* through which the abilities and wills of individuals may be most efficaciously exerted, for the accommodation of the government by loans. The attorney-general opposes to this reasoning the following observation: Borrowing money presupposes the accumulation of a fund to be lent; and is secondary to the creation of an ability to lend. This is plausible in theory, but it is not true in fact. In a great number of cases, a previous accumulation of a fund, equal to the whole sum required, does not exist; and nothing more can be actually presupposed, than that there exist resources, which, put into activity to the greatest advantage, by the nature of the operation with the government, will be equal to the effect desired to be produced. All the provisions and operations of government must be presumed to contemplate things as they *really* are. The institution of a bank has also a natural relation to the regulation of trade between the States, in so far as it is conducive to the creation of a convenient medium of exchange between them, and to the keeping up a full circulation by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns. And this does not mean merely gold and silver; many other things have served the purpose with different degrees of utility. Paper has been extensively employed. It cannot, therefore, be admitted, with the attorney-general, that the regulation of trade between the States, as it concerns the medium of circulation and exchange, ought to be considered as confined to coin. It is even supposable, that the whole, or the greatest part of the coin of the country, might be carried out of it. The

canals.¹ If this proves anything, it proves no more than that it was thought inexpedient to give a power to incorporate for the

Secretary of State objects to the relation here insisted upon, by the following mode of reasoning : To erect a bank, says he, and to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce. So does he, who raises a bushel of wheat, or digs a dollar out of the mines ; yet neither of these persons regulates commerce thereby. To make a thing, which may be bought and sold, is not to prescribe regulations for *buying* and *selling*. This is making the regulation of commerce to consist in prescribing rules for buying and selling. This, indeed, is a species of regulation of trade, but it is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care they must have presumed to have been intended to be directed to those general political arrangements concerning trade, on which its aggregate interests depend, rather than to the details of buying and selling. Accordingly, such only are the regulations to be found in the laws of the United States ; whose objects are to give encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures. And it is in reference to these general relations of commerce, that an establishment, which furnishes facilities to circulation and a convenient medium of exchange and alienation, is to be regarded as a regulation of trade.

“The Secretary of State further urges, that if this was a regulation of commerce, it would be *void*, as *extending* as much to the internal part of every State, as to its external. But what regulation of commerce does not extend to the internal commerce of every State ? What are all the duties upon imported articles, amounting in some cases to prohibitions, but so many bounties upon domestic manufactures, affecting the interest of different classes of citizens in different ways ? What are all the provisions in the coasting act, which relate to the trade between district and district of the same State ? In short, what regulation of trade between the States, but must affect the internal trade of each State ? what can operate upon the whole, but must extend to every part ? The relation of a bank to the execution of the powers that concern the common defence has been anticipated. It has been noted, that, at this very moment, the aid of such an institution is essential to the measure to be pursued for the protection of our frontiers.

“It now remains to show, that the incorporation of a bank is within the operation of the provision which authorizes Congress to make all needful rules and regulations concerning the property of the United States. But it is previously necessary to advert to a distinction which has been taken up by the attorney-general. He admits that the word ‘property’ may signify personal property, however acquired ; and yet asserts, that it cannot signify money arising from the sources of revenue pointed out in the Constitution, ‘because,’ says he, ‘the disposal and regulation of money is the final cause for raising it by taxes.’ But it would be more accurate to say, that the *object* to which money is intended to be applied, is the *final cause* for raising it, than that the disposal and regulation of it is such. The support of a government, the support of troops for the common defence, the payment of the public debt, are the true final causes for raising money. The disposition and regulation of it, when raised, are the steps by which it is applied to the *ends* for which it was raised, not the ends themselves. Hence, therefore, the money to be raised by taxes, as well as any other personal property, must be supposed to come within the meaning, as they certainly do within the

¹ Journal of Convention, p. 376.

purpose of opening canals generally. But very different accounts are given of the import of the proposition, and of the motives for

letter, of authority to make all needful rules and regulations concerning the property of the United States. A case will make this plainer. Suppose the public debt discharged, and the funds now pledged for it, liberated. In some instances it would be found expedient to repeal the taxes; in others, the repeal might injure our own industry, our agriculture, and manufactures. In these cases, they would, of course, be retained. Here, then, would be moneys arising from the authorized sources of revenue, which would not fall within the rule by which the attorney-general endeavors to except them from other personal property, and from the operation of the clause in question. The moneys being in the coffers of government, what is to hinder such a disposition to be made of them, as is contemplated in the bill? or what an incorporation of the parties concerned, under the clause which has been cited?

“It is admitted, that, with regard to the western territory, they give a power to erect a corporation; that is, to constitute a government. And by what rule of construction can it be maintained, that the same words, in a constitution of government, will not have the same effect, when applied to one species of property as to another, as far as the subject is capable of it? Or that a legislative power to make all needful rules and regulations, or to pass all laws necessary and proper concerning the public property, which is admitted to authorize an incorporation in one case, will not authorize it in another? will justify the institution of a government over the western territory, and will not justify the incorporation of a bank, for the more useful management of the money of the nation? If it will do the last as well as the first, then, under this provision alone, the bill is constitutional, because it contemplates, that the United States shall be joint proprietors of the stock of the bank. There is an observation of the Secretary of State, to this effect, which may require notice in this place. Congress, says he, are not to lay taxes *ad libitum*, for any purpose they please, but only to pay the debts, or provide for the welfare of the Union. Certainly, no inference can be drawn from this against the power of applying their money for the institution of a bank. It is true, that they cannot, without breach of trust, lay taxes for any other purpose than the general welfare; but so neither can any other government. The welfare of the community is the only legitimate end for which money can be raised on the community. Congress can be considered as only under one restriction which does not apply to other governments. They cannot rightfully apply the money they raise to any purpose, merely or purely local. But with this exception, they have as large a discretion, in relation to the application of money, as any legislature whatever.

“The constitutional test of a right application must always be, whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the Union, must be matter of conscientious discretion; and the arguments for or against a measure, in this light, must be arguments concerning expediency or, inexpediency, not constitutional right; whatever relates to the general order of the finances, to the general interests of trade, &c., being general objects, are constitutional ones for the *application of money*. A bank, then, whose bills are to circulate in all the revenues of the country, is evidently a general object; and, for that very reason, a constitutional one, as far as regards the appropriation of money to it. Whether it will really be a beneficial one or not, is worthy of careful examination; but is no more a constitutional point, in the particular referred to, than the question, whether the western lands shall be sold for twenty or thirty cents per acre. A hope is entertained that,

rejecting it. Some affirm, that it was confined to the opening of canals and obstructions of rivers; others, that it embraced banks;

by this time, it has been made to appear, to the satisfaction of the President, that the bank has a natural relation to the power of collecting taxes; to that of regulating trade; to that of providing for the common defence; and that, as the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the Constitution which immediately respects the property of the United States. Under a conviction that such a relation subsists, the secretary of the treasury, with all deference, conceives that it will result, as a necessary consequence, from the position that all the specified powers of government are sovereign, as to the proper objects, that the incorporation of a bank is a constitutional measure; and that the objections taken to the bill, in this respect, are ill-founded.

"But, from an earnest desire to give the utmost possible satisfaction to the mind of the President, on so delicate and important a subject, the secretary of the treasury will ask his indulgence, while he gives some additional illustrations of cases, in which a power of erecting corporations may be exercised, under some of those heads of the specified powers of the government, which are alleged to include the right of incorporating a bank. 1. It does not appear susceptible of a doubt, that if Congress had thought proper to provide in the collection law that the bonds to be given for the duties should be given to the collector of the district, A. or B., as the case might require, to inure to him and his successors in office, in trust for the United States, that it would have been consistent with the Constitution to make such an arrangement. And yet this, it is conceived, would amount to an incorporation. 2. It is not an unusual expedient of taxation to farm particular branches of revenue; that is, to sell or mortgage the product of them for certain definite sums, leaving the collection to the parties to whom they are mortgaged or sold. There are even examples of this in the United States. Suppose that there was any particular branch of revenue which it was manifestly expedient to place on this footing, and there were a number of persons willing to engage with the government upon condition that they should be incorporated and the funds vested in them, as well for their greater safety as for the more convenient recovery and management of the taxes; is it supposable that there could be any constitutional obstacle to the measure? It is presumed that there could be none. It is certainly a mode of collection which it would be in the discretion of the government to adopt, though the circumstances must be very extraordinary that would induce the secretary to think it expedient. 3. Suppose a new and unexplored branch of trade should present itself with some foreign country. Suppose it was manifest that, to undertake it with advantage, required a union of the capitals of a number of individuals, and that those individuals would not be disposed to embark without an incorporation, as well to obviate the consequences of a private partnership, which makes every individual liable in his whole estate for the debts of the company to their utmost extent, as for the more convenient management of the business; what reason can there be to doubt that the national government would have a constitutional right to institute and incorporate such a company? None. They possess a general authority to regulate trade with foreign countries. This is a mean, which has been practised to that end by all the principal commercial nations who have trading companies to this day which have subsisted for centuries. Why may not the United States *constitutionally* employ the means usual in other countries for attaining the ends intrusted to them? A power to make all needful

and others, that it extended to the power of incorporations generally. Some, again, allege that it was disagreed to, because it

rules and regulations concerning territory has been construed to mean a power to erect a government. A power to regulate trade is a power to make all needful rules and regulations concerning trade. Why may it not, then, include that of erecting a trading company as well as in other cases to erect a government?

"It is remarkable that the State conventions, who have proposed amendments in relation to this point, have most, if not all of them, expressed themselves nearly thus: Congress shall not grant monopolies, nor *erect any company* with exclusive advantages of commerce! Thus, at the same time, expressing their sense that the power to erect trading companies, or corporations, was inherent in Congress, and objecting to it no further than as to the grant of *exclusive* privileges. The secretary entertains all the doubts which prevail concerning the utility of such companies; but he cannot fashion to his own mind a reason to induce a doubt that there is a constitutional authority in the United States to establish them. If such a reason were demanded, none could be given, unless it were this, — that Congress cannot erect a corporation; which would be no better than to say, they cannot do it because they cannot do it. First, presuming an inability without reason, and then assigning that inability as the cause of itself. Illustrations of this kind might be multiplied without end. They will, however, be pursued no further.

"There is a sort of evidence on this point, arising from an aggregate view of the Constitution, which is of no inconsiderable weight. The very general power of laying and collecting taxes and appropriating their proceeds; that of borrowing money indefinitely; that of coining money and regulating foreign coins; that of making all needful rules and regulations respecting the property of the United States, — these powers combined, as well as the reason and nature of the thing, speak strongly this language: that it is the manifest design and scope of the Constitution to vest in Congress all the powers requisite to the effectual administration of the finances of the United States. As far as concerns this object, there appears to be no parsimony of power. To suppose, then, that the government is precluded from the employment of so usual and so important an instrument for the administration of its finances as that of a bank, is to suppose what does not coincide with the general tenor and complexion of the Constitution, and what is not agreeable to impressions that any mere spectator would entertain concerning it. Little less than a prohibitory clause can destroy the strong presumptions which result from the general aspect of the government. Nothing but demonstration should exclude the idea that the power exists.

"In all questions of this nature, the practice of mankind ought to have great weight against the theories of individuals. The fact, for instance, that all the principal commercial nations have made use of trading corporations or companies, for the purpose of *external commerce*, is a satisfactory proof that the establishment of them is an incident to the regulation of commerce. This other fact, that banks are a usual engine in the administration of national finances, and an ordinary and the most effectual instrument of loans, and one which, in this country, has been found essential, pleads strongly against the supposition, that a government clothed with most of the important prerogatives of sovereignty, in relation to its revenues, its debt, its credit, its defence, its trade, its intercourse with foreign nations, is forbidden to make use of that instrument as an appendage to its own authority. It has been usual, as an auxiliary test of constitutional authority, to try whether it abridges any pre-

was thought improper to vest in Congress a power of erecting corporations; others, because they thought it unnecessary to specify the power, and inexpedient to furnish an additional topic of objection to the Constitution. In this state of the matter, no inference whatever can be drawn from it.¹ But, whatever may have been the private intentions of the framers of the Constitution, which can rarely be established by the mere fact of their votes, it is certain that the true rule of interpretation is, to ascertain the public and just intention from the language of the instrument itself, according to the common rules applied to all laws. The people who adopted the Constitution could know nothing of the private intentions of the framers. They adopted it upon its own clear import, upon its own naked text. Nothing is more common than for a law to effect more or less than the intention of the persons who framed it; and it must be judged of by its words and sense, and not by any private intentions of members of the legislature.²

§ 1269. In regard to the faculties of the bank, if Congress could constitutionally create it, they might confer on it such faculties and powers as were fit to make it an appropriate means for fiscal operations. They had a right to adapt it in the best manner to its end. No one can pretend that its having the faculty of holding a capital; of lending and dealing in money; of issuing bank-notes; of receiving deposits; and of appointing suitable officers to manage its affairs, are not highly useful and expedient, and appropriate to the purposes of a bank. They are just such as are usually granted to State banks; and just such as give increased facilities to all its operations. To say that the bank might have gone on without this or that faculty is nothing. Who, but Congress, shall say how few or how many it shall have, if all are still appropriate to it, as an instrument of government,

existing right of any State or any individual. The proposed measure will stand the most severe examination on this point. Each State may still erect as many banks as it pleases. Every individual may still carry on the banking business to any extent he pleases. Another criterion may be this: whether the institution or thing has a more direct relation, as to its uses, to the objects of the reserved powers of the State government than to those of the powers delegated by the United States. This rule, indeed, is less precise than the former; but it may still serve as some guide. Surely a bank has more reference to the objects intrusted to the national government than to those left to the care of the State governments. The common defence is decisive in this comparison." — 1 Hamilton's Works, 138 to 154.

¹ Hamilton on Bank, 1 Hamilton's Works, 127.

² Hamilton on Bank, 1 Hamilton's Works, 127, 128.

and may make it more convenient and more useful in its operations? No man can say that a single faculty in any national charter is useless, or irrelevant, or strictly improper, that is conducive to its end as a national instrument. Deprive a bank of its trade and business, and its vital principles are destroyed. Its form may remain, but its substance is gone. All the powers given to the bank are to give efficacy to its functions of trade and business.¹

§ 1270. As to another suggestion, that the same objects might have been accomplished through the State banks, it is sufficient to say, that no trace can be found in the Constitution of any intention to create a dependence on the States, or State institutions, for the execution of its great powers. Its own means are adequate to its end; and on those means it was expected to rely for their accomplishment. It would be utterly absurd to make the powers of the Constitution wholly dependent on State institutions. But if State banks might be employed, as Congress have a choice of means, they had a right to choose a national bank, in preference to State banks, for the financial operations of the government.² Proof that they might use one means is no proof that they cannot constitutionally use another means.

§ 1271. After all, the subject has been settled repeatedly by every department of the government, — legislative, executive, and judicial. The States have acquiesced; and a majority have constantly sustained the power. If it is not now settled, it never can be. If it is settled, it would be too much to expect a re-argument, whenever any person may choose to question it.³ (a)

¹ *Osborn v. Bank of United States*, 9 Wheat. R. 861, 862 to 865.

² *M'Culloch v. Maryland*, 4 Wheat. R. 424.

³ See 4 Elliot's Debates, 216 to 229; *M'Culloch v. Maryland*, 4 Wheat. R. 316; *Osborn v. Bank of United States*, 9 Wheat. R. 738, 859; 1 Kent's Comm. Lect. 12, pp. 233 to 239; Sergeant on Constitution, ch. 28 [ch. 30]; 5 Marsh. Wash. App. note 3.

(a) The whole subject was nevertheless re-argued over and over during the administration of President Tyler, who refused his assent to bills for the establishment of a national bank, on the ground of want of power for the purpose. See, in addition to the debates themselves, Mr. Benton's Abridgment of Debates; Ben-

ton's Thirty Years' View; Works of Henry Clay; Seven Decades of the Union, by Henry A. Wise; Webster's Life, by Curtis, II. 70-73. The establishment of the existing National banking system in 1863, elicited but little discussion in denial of the power.

CHAPTER XXVI.

POWERS OF CONGRESS—INTERNAL IMPROVEMENTS.

§ 1272. ANOTHER question, which has for a long time agitated the public councils of the nation, is, as to the authority of Congress to make roads, canals, and other internal improvements.

§ 1273. So far as regards the right to appropriate money to internal improvements generally, the subject has already passed under review in considering the power to lay and collect taxes. The doctrine there contended for, which has been in a great measure borne out by the actual practice of the government, is, that Congress may appropriate money, not only to clear obstructions to navigable rivers; to improve harbors; to build breakwaters; to assist navigation; to erect forts, light-houses, and piers; and for other purposes allied to some of the enumerated powers; but may also appropriate it in aid of canals, roads, and other institutions of a similar nature, existing under State authority. The only limitations upon the power are those prescribed by the terms of the Constitution, that the objects shall be for the common defence, or the general welfare of the Union. The true test is, whether the object be of a local character, and local use; or, whether it be of general benefit to the States.¹ If it be purely local, Congress cannot constitutionally appropriate money for the object. But, if the benefit be general, it matters not whether in point of locality it be in one State, or several; whether it be of large, or of small extent; its nature and character determine the right, and Congress may appropriate money in aid of it; for it is then, in a just sense, for the general welfare.

¹ Hamilton's Report on Manufactures, 1791, 1 Hamilton's Works, 231, 232; 1 Kent's Comm. Lect. 12, pp. 250, 251 (2d ed. pp. 267, 268); Sergeant on Constitution, ch. 28 [ch. 30]; President Monroe's Exposition and Message, 4th May, 1822, pp. 38, 39.

§ 1274. But it has been contended, that the Constitution is not confined to mere appropriations of money; but authorizes Congress directly to undertake and carry on a system of internal improvements for the general welfare, wherever such improvements fall within the scope of any of the enumerated powers. Congress may not, indeed, engage in such undertakings merely because they are internal improvements, for the general welfare, unless they fall within the scope of the enumerated powers. The distinction between this power and the power of appropriation is, that in the latter, Congress may appropriate to any purpose which is for the common defence or general welfare; but in the former, they can engage in such undertakings only as are means or incidents to its enumerated powers. Congress may, therefore, authorize the making of a canal, as incident to the power to regulate commerce, where such canal may facilitate the intercourse between State and State. They may authorize light-houses, piers, buoys, and beacons to be built for the purposes of navigation. They may authorize the purchase and building of custom-houses, and revenue cutters, and public warehouses, as incidents to the power to lay and collect taxes. They may purchase places for public uses; and erect forts, arsenals, dock-yards, navy-yards, and magazines, as incidents to the power to make war.

§ 1275. For the same reason Congress may authorize the laying out and making of a military road, and acquire a right over the soil for such purposes; and as incident thereto they have a power to keep the road in repair, and prevent all obstructions thereto. But in these, and the like cases, the general jurisdiction of the State over the soil, subject only to the rights of the United States, is not excluded. As, for example, in case of a military road; although a State cannot prevent repairs on the part of the United States, or authorize any obstructions of the road, its general jurisdiction remains untouched. It may punish all crimes committed on the road; and it retains, in other respects, its territorial sovereignty over it. The right of soil may still remain in the State, or in individuals, and the right to the easement only in the national government. There is a great distinction between the exercise of a power, excluding altogether State jurisdiction, and the exercise of a power, which leaves the State jurisdiction generally in force, and yet includes, on the

part of the national government, a power to preserve what it has created.¹

§ 1276. In all these, and other cases, in which the power of Congress is asserted, it is so upon the general ground of its being an incidental power; and the course of reasoning, by which it is supported, is precisely the same as that adopted in relation to other cases already considered. It is, for instance, admitted, that Congress cannot authorize the making of a canal, except for some purpose of commerce among the States or for some other purpose belonging to the Union; and it cannot make a military road, unless it be necessary and proper for purposes of war. To go over the reasoning at large would, therefore, be little more than a repetition of what has been already fully expounded.² The journal of the convention is not supposed to furnish any additional lights on the subject, beyond what have been already stated.³

§ 1277. The resistance to this extended reach of the national powers turns also upon the same general reasoning, by which a strict construction of the Constitution has been constantly maintained. It is said that such a power is not among those enumerated in the Constitution; nor is it implied, as a means of executing any of them. The power to regulate commerce cannot include a power to construct roads and canals, and improve the navigation of watercourses in order to facilitate, promote, and secure such commerce, without a latitude of construction departing from the ordinary import of the terms, and incompatible with the nature of the Constitution.⁴ The liberal interpretation

¹ See 1 Kent's Comm. Lect. 12, pp. 250, 251; Sergeant on Constitution, ch. 28 [ch. 30, ed. 1830]; 2 U. S. Law Journal, April, 1826, p. 251, &c.; 3 Elliot's Debates, 309, 310; 4 Elliot's Debates, 244, 265, 279, 291, 356; Webster's Speeches, pp. 392 to 397.

² See *M'Culloch v. Maryland*, 4 Wheat. R. 406, 407, 413 to 421; Webster's Speeches, pp. 392 to 397; 4 Elliot's Debates, 280.

³ Journal of Convention, pp. 260, 376.

⁴ President Madison's Message, 3d March, 1817; 4 Elliot's Debates, 280, 281; President Monroe's Message, 4th May, 1822, pp. 22 to 35; President Jackson's Message, 27th May, 1830; 4 Elliot's Debates, 333, 334, 335; 1 Kent's Comm. Lect. 12, pp. 250, 251; 4 Elliot's Debates, 291, 292, 354, 355; Sergeant on Constitution, ch. 28 [ch. 30]; 4 Jefferson's Corresp. 421. President Monroe, in his elaborate Exposition accompanying his Message of the 4th of May, 1822, denies the independent right of Congress to construct roads and canals; but asserts in the strongest manner their right to *appropriate* money to such objects. His reasoning for the latter is thought by many to be quite irresistible in favor of the former. See the message from page 35 to page 47. One short passage may be quoted. "Good roads and canals will

has been very uniformly asserted by Congress; the strict interpretation has not uniformly, but has upon several important occasions been insisted upon by the executive.¹ In the present state of the controversy, the duty of forbearance seems inculcated upon the commentator; and the reader must decide for himself upon his own views of the subject.

§ 1278. Another question has been made, how far Congress could make a law giving to the United States a preference and priority of payment of their debts, in cases of the death, or insolvency, or bankruptcy of their debtors, out of their estates. It has been settled, upon deliberate argument, that Congress possess such a constitutional power. It is a necessary and proper power to carry into effect the other powers of the government. The government is to pay the debts of the Union; and must be authorized to use the means which appear to itself most eligible to effect that object. It may purchase and remit bills for this object; and it may take all those precautions, and make all those regulations, which will render the transmission safe. It may, in like manner, pass all laws to render effectual the collection of its debts. It is no objection to this right of priority, that it will interfere with the rights of the State sovereignties respecting the dignity of debts, and will defeat the measures which they have a right to adopt to secure themselves against delinquencies on the part of their own revenue or other officers. This objection, if of any avail, is an objection to the powers given by the Constitution. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.²

§ 1279. It is under the same implied authority that the United States have any right even to sue in their own courts; for an promote many very important national purposes. They will facilitate the operations of war; the movements of troops; the transportation of cannon, of provisions and every warlike store, much to our advantage and the disadvantage of the enemy in time of war. Good roads will facilitate the transportation of the mail, and thereby promote the purposes of commerce and political intelligence among the people. They will, by being properly directed to these objects, enhance the value of our vacant lands, a treasure of vast resource to the nation." This is the very reasoning by which the friends of the general power support its constitutionality.

¹ 4 Jefferson's Corresp. 421; 1 Kent's Comm. Lect. 12, pp. 250, 251.

² United States v. Fisher, 2 Cranch, 358; Harrison v. Sterry, 5 Cranch, 289; 1 Kent's Comm. Lect. 12, pp. 229 to 233.

express power is nowhere given in the Constitution, though it is clearly implied in that part respecting the judicial power. And Congress may not only authorize suits to be brought in the name of the United States, but in the name of any artificial person (such as the postmaster-general¹), or natural person for their benefit.² Indeed, all the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns.³ The right of making contracts and instituting suits is an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers; and enforce the observance of them by suits and judicial process.⁴

§ 1280. There are almost innumerable cases, in which the auxiliary and implied powers belonging to Congress have been put into operation. But the object of these commentaries is rather to take notice of those which have been the subject of animadversion, than of those which have hitherto escaped reproof, or have been silently approved.

§ 1281. Upon the ground of a strict interpretation, some extraordinary objections have been taken in the course of the practical operations of the government. The very first act, passed under the government, which regulated the time, form, and manner of administering the oaths prescribed by the Constitution,⁵ was denied to be constitutional. But the objection has long since been abandoned.⁶ It has been doubted, whether it is constitutional to permit the secretaries to draft bills on subjects connected with their departments, to be presented to the House of Representatives for their consideration.⁷ It has been doubted,

¹ *Postmaster-General v. Early*, 12 Wheat. R. 136.

² See *Dugan v. United States*, 3 Wheat. R. 173, 179; *United States v. Buford*, 3 Peters's R. 12, 30; *United States v. Tingey*, 5 Peters's R. 115, 127, 128.

³ *Cox v. United States*, 6 Peters's R. 172.

⁴ *United States v. Tingey*, 5 Peters's R. 115, 128.

⁵ Act of 1st June, 1789, ch. 1.

⁶ 4 Elliot's Deb. 139, 140, 141; 1 Lloyd's Deb. 218 to 225.

⁷ 4 Elliot's Debates, 238, 239, 240.

whether an act authorizing the President to lay, regulate, and revoke embargoes was constitutional.¹ It has been doubted, whether Congress have authority to establish a military academy.² But these objections have been silently, or practically abandoned.

¹ 4 Elliot's Debates, 240. See Id. 265.

² 4 Jefferson's Corresp. 499.

CHAPTER XXVII.

POWERS OF CONGRESS — PURCHASES OF FOREIGN TERRITORY —
EMBARGOES.

§ 1282. BUT the most remarkable powers, which have been exercised by the government, as auxiliary and implied powers, and which, if any, go to the utmost verge of liberal construction, are the laying of an unlimited embargo in 1807, and the purchase of Louisiana in 1803, and its subsequent admission into the Union, as a State. These measures were brought forward, and supported and carried, by the known and avowed friends of a strict construction of the Constitution; and they were justified at the time, and can be now justified only upon the doctrines of those who support a liberal construction of the Constitution. The subject has been already hinted at; but it deserves a more deliberate review.

§ 1283. In regard to the acquisition of Louisiana: The treaty of 1803 contains a cession of the whole of that vast territory by France to the United States, for a sum exceeding eleven millions of dollars. There is a stipulation in the treaty, on the part of the United States, that the inhabitants of the ceded territory shall be incorporated into the Union, and admitted, as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.¹

§ 1284. It is obvious, that the treaty embraced several very important questions, each of them, upon the grounds of a strict construction, full of difficulty and delicacy. In the first place, had the United States a constitutional authority to accept the cession and pay for it? In the next place, if they had, was the stipulation for the admission of the inhabitants into the Union, as a State, constitutional, or within the power of Congress to give it effect?

§ 1285. There is no pretence that the purchase or cession of

¹ Art. 3.

any foreign territory is within any of the powers expressly enumerated in the Constitution. It is nowhere in that instrument said, that Congress, or any other department of the national government, shall have a right to purchase or accept of any cession of foreign territory. The power itself, it has been said, could scarcely have been in the contemplation of the framers of it. It is, in its own nature, as dangerous to liberty, as susceptible of abuse, in its actual application, and as likely as any which could be imagined to lead to a dissolution of the Union. If Congress have the power, it may unite any foreign territory whatsoever to our own, however distant, however populous, and however powerful. Under the form of a cession, we may become united to a more powerful neighbor or rival, and be involved in European or other foreign interests and contests to an interminable extent. And if there may be a stipulation for the admission of foreign States into the Union, the whole balance of the Constitution may be destroyed, and the old States sunk into utter insignificance. It is incredible that it should have been contemplated that any such overwhelming authority should be confided to the national government with the consent of the people of the old States. If it exists at all, it is unforeseen, and the result of a sovereignty intended to be limited, and yet not sufficiently guarded. The very case of the cession of Louisiana is a striking illustration of the doctrine. It admits, by consequence, into the Union an immense territory, equal to, if not greater, than that of all the United States under the peace of 1783. In the natural progress of events, it must, within a short period, change the whole balance of power in the Union, and transfer to the west all the important attributes of the sovereignty of the whole. If, as is well known, one of the strong objections urged against the Constitution was, that the original territory of the United States was too large for a national government, it is inconceivable that it could have been within the intention of the people that any additions of foreign territory should be made, which should thus double every danger from this source. The treaty-making power must be construed as confined to objects within the scope of the Constitution. And, although Congress have authority to admit new States into the firm, yet it is demonstrable that this clause had sole reference to the territory then belonging to the United States, and was designed for the admission of the

States which, under the ordinance of 1787, were contemplated to be formed within its old boundaries. In regard to the appropriation of money, for the purposes of the cession, the case is still stronger. If no appropriation of money can be made, except for cases within the enumerated powers (and this clearly is not one), how can the enormous sum of eleven millions be justified for this object? If it be said that it will be "for the common defence and general welfare" to purchase the territory, how is this reconcilable with the strict construction of the Constitution? If Congress can appropriate money for one object, because it is deemed for the common defence and general welfare, why may they not appropriate it for all objects of the same sort? If the territory can be purchased, it must be governed; and a territorial government must be created. But where can Congress find authority in the Constitution to erect a territorial government, since it does not possess the power to erect corporations?

§ 1286. Such were the objections which have been and in fact may be, urged against the cession, and the appropriations made to carry the treaty into effect. The friends of the measure were driven to the adoption of the doctrine, that the right to acquire territory was incident to national sovereignty; that it was a resulting power, growing necessarily out of the aggregate powers confided by the federal Constitution; that the appropriation might justly be vindicated upon this ground, and also upon the ground that it was for the common defence and general welfare. In short, there is no possibility of defending the constitutionality of this measure, but upon the principles of the liberal construction which has been, upon other occasions, so earnestly resisted.¹

¹ See the Debates in 1803, on the Louisiana Treaty, printed by T. & G. Palmer, in Philadelphia, in 1804, and 4 Elliot's Debates, 257 to 260. The objections were not taken merely by persons who were at that time in opposition to the national administration. President Jefferson himself (under whose auspices the treaty was made) was of opinion that the measure was unconstitutional, and required an amendment of the Constitution to justify it. He accordingly urged his friends strenuously to that course; at the same time he added, "that it will be desirable for Congress to do what is necessary in *silence*;" "whatever Congress shall think necessary to do should be done with as little debate as possible, and particularly so far as respects the constitutional difficulty." "I confess, then, I think it important, in the present case, to set an example against broad construction, by appealing for new power to the people. If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects." What a latitude of interpretation

§ 1287. As an incidental power, the constitutional right of the United States to acquire territory would seem so naturally to flow from the sovereignty confided to it, as not to admit of very serious question. The Constitution confers on the government of the Union the power of making war and of making treaties; and it seems, consequently, to possess the power of acquiring territory, either by conquest or treaty.¹ If the cession be by treaty, the terms of that treaty must be obligatory, for it is the law of the land. And if it stipulates for the enjoyment by the inhabitants of the rights, privileges, and immunities of citizens of the United States, and for the admission of the territory into the Union, as a State, these stipulations must be equally obligatory. They are within the scope of the constitutional authority of the government, which has the right to acquire territory, to make treaties, and to admit new States into the Union.^{2(a)}

§ 1288. The more recent acquisition of Florida, which has been universally approved, or acquiesced in, by all the States,

is this! The Constitution may be overleaped, and a *broad* construction adopted for favorite measures, and resistance is to be made to such a construction only when it shall produce ill effects! His letter to Dr. Sibley (in June, 1803), recently published, is decisive, that he thought an amendment of the Constitution necessary. Yet he did not hesitate without such amendments to give effect to every measure to carry the treaty into effect during his administration. See 4 Jefferson's Corresp. pp. 1, 2, 3; Letter to Dr. Sibley, and Mr. J. Q. Adams's Letter to Mr. Speaker Stevenson, July 11, 1832.

¹ *Amer. Insur. Co. v. anter*, 1 Peters's Sup. R. 511, 542; *Id.* 517, note, Mr. Justice Johnson's Opinion.

² In the celebrated Hartford Convention, in January, 1815, a proposition was made to amend the Constitution, so as to prohibit the admission of new States into the Union without the consent of two-thirds of both houses of Congress. In the accompanying report there is a strong, though indirect, denial of the power to admit new States *without the original limits* of the United States.

(a) The protest against the acquisition of Louisiana was very earnest in some quarters. The legislature of Massachusetts resolved "that the annexation of Louisiana to the Union transcends the constitutional power of the government of the United States. It forms a new Confederacy to which the States united by the former compact are not bound to adhere." And afterwards, when a bill was pending in Congress for the admission of Louisiana as a State, in accordance with the terms of the cession, Mr. Josiah

Quincy, a member for Massachusetts, used that famous expression which subjected him to so much obloquy: "It is my deliberate opinion that if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligation, and that, as it will be the right of all, so it will be the duty of some, definitely to prepare for separation, *amicably if they can, violently if they must.*" *Life of Quincy*, p. 206; *Tyler's Memoir of Chief Justice Taney*, 333. C.

can be maintained only on the same principles, and furnishes a striking illustration of the truth, that constitutions of government require a liberal construction to effect their objects, and that a narrow interpretation of their powers, however it may suit the views of speculative philosophers or the accidental interests of political parties, is incompatible with the permanent interests of the State, and subversive of the great ends of all government, — the safety and independence of the people.

§ 1289. The other instance of an extraordinary application of the implied powers of the government, above alluded to, is the embargo laid in the year 1807, by the special recommendation of President Jefferson. It was avowedly recommended, as a measure of safety for our vessels, our seamen, and our merchandise from the then threatening dangers from the belligerents of Europe;¹ and it was explicitly stated “to be a measure of precaution called for by the occasion;” and “neither hostile in its character, nor as justifying, or inciting, or leading to hostility with any nation whatever.”² It was in no sense, then, a war measure. If it could be classed at all, as flowing from, or as an incident to, any of the enumerated powers, it was that of regulating commerce. In its terms, the act provided, that an embargo be, and hereby is, laid on all ships and vessels in the ports, or within the limits or jurisdiction of the United States, &c., bound to any foreign port or place.³ It was in its terms unlimited in duration; and could be removed only by a subsequent act of Congress, having the assent of all the constitutional branches of the legislature.⁴

§ 1290. No one can reasonably doubt, that the laying of an embargo, suspending commerce for a limited period, is within the scope of the Constitution. But the question of difficulty was, whether Congress, under the power to regulate commerce with foreign nations, could constitutionally suspend and interdict it wholly for an unlimited period, that is, by a permanent act, having no limitation as to duration, either of the act, or of the

¹ 6 Wait's State Papers, 57.

² 7 Wait's State Papers, 25, Mr. Madison's Letter to Mr. Pinkney; *Gibbons v. Ogden*, 9 Wheat. R. 191, 192, 193.

³ Act 22d December, 1807, ch. 5.

⁴ In point of fact, it remained in force until the 28th of June, 1809, being repealed by an act passed on the first of March, 1809, to take effect at the end of the next session of Congress, which terminated on the 28th of June, 1809.

embargo. It was most seriously controverted, and its constitutionality denied in the eastern States of the Union, during its existence. (a) An appeal was made to the judiciary upon the question; and it having been settled to be constitutional by that department of the government, the decision was acquiesced in, though the measure bore with almost unexampled severity upon the eastern States; and its ruinous effects can still be traced along their extensive seaboard. The argument was, that the power to regulate did not include the power to annihilate commerce, by interdicting it permanently and entirely with foreign nations. The decision was, that the power of Congress was sovereign, relative to commercial intercourse, qualified by the limitations and restrictions contained in the Constitution itself. Non-intercourse and embargo laws are within the range of legislative discretion; and if Congress have the power, for purposes of safety, of preparation, or counteraction, to suspend commercial intercourse with foreign nations, they are not limited, as to the duration, any more than as to the manner and extent of the measure.¹

§ 1291. That this measure went to the utmost verge of constitutional power, and especially of implied power, has never been denied. That it could not be justified by any but the most liberal construction of the Constitution, is equally undeniable. It was the favorite measure of those who were generally the advocates of the strictest construction. It was sustained by the people from a belief, that it was promotive of the interests, and important to the safety of the Union.

§ 1292. At the present day, few statesmen are to be found, who seriously contest the constitutionality of the acts respecting either the embargo, or the purchase and admission of Louisiana into the Union. The general voice of the nation has sustained and supported them. Why, then, should not that general voice be equally respected in relation to other measures of vast public importance, and by many deemed of still more vital interest to the country, such as the tariff laws, and the national bank char-

¹ *United States v. The Brig William*, 2 Hall's Law Journal, 255; 1 Kent's Comm. Lect. 19, p. 405; Sergeant on Const. Law, ch. 28 (ch. 30); *Gibbons v. Ogden*, 9 Wheat. R. 1, 191 to 193.

(a) Webster's Works, III. 326 to 329; *Reminiscences of Samuel Dexter*, by "Sigma," 59 to 61.

ter? Can any measures furnish a more instructive lesson, or a more salutary admonition, in the whole history of parties, at once to moderate our zeal and awaken our vigilance, than those which stand upon principles repudiated at one time upon constitutional scruples, and solemnly adopted at another time, to subserve a present good, or foster the particular policy of an administration? While the principles of the Constitution should be preserved with a most guarded caution, and a most sacred regard to the rights of the States, it is at once the dictate of wisdom and enlightened patriotism to avoid that narrowness of interpretation, which would dry up all its vital powers, or compel the government (as was done under the confederation) to break down all constitutional barriers, and trust for its vindication to the people, upon the dangerous political maxim, that the safety of the people is the supreme law (*salus populi suprema lex*); a maxim, which might be used to justify the appointment of a dictator, or any other usurpation.¹

§ 1293. There remain one or two other measures, of a political nature, whose constitutionality has been denied; but which, being of a transient character, have left no permanent traces in the constitutional jurisprudence of the country. Reference is here made to the alien and sedition laws, passed in 1798, both of which were limited to a short duration, and expired by their own limitation.² One (the alien act) authorized the President to order out of the country such aliens as he should deem dangerous to the peace and safety of the United States, or should have rea-

¹ Mr. Jefferson, on many occasions, was not slow to propose or justify measures of a very strong character; and such as proceeded altogether upon the ground of implied powers. Thus, in writing to Mr. Crawford, on 20th of June, 1816, he deliberately proposed, with a view to enable us in future to meet any war, to adopt "the report of the then secretary of the war department, for placing the force of the nation at effectual command," and to "insure resources for money by the suppression of all paper circulation during peace, and licensing that of the nation alone during war." 4 Jefferson's Corresp. 285. Whence are these vast powers derived? The latter would amount to a direct prohibition of the circulation of any bank-notes of the State banks; and, in fact, would amount to a suppression of the most effective powers of the State banks. (a)

² Act of 25th of June, 1798, ch. 75; Act of 14th of July, 1798, ch. 91; 1 Tuck. Black. Comm. App. part 1, note G, pp. 11 to 30.

(a) Yet this is precisely what is done in effect by the existing National Currency Act, the power to do which was sustained by the Supreme Court in *Veazie Bank v. Feuno*, 8 Wall. 533.

sonable grounds to suspect to be concerned in any treasonable or secret machinations against the government of the United States, under severe penalties for disobedience. The other declared it a public crime, punishable with fine and imprisonment, for any persons unlawfully to combine, and conspire together, with intent to oppose any measure or measures of the United States, &c. ; or, with such intent, to counsel, advise, or attempt to procure any insurrection, unlawful assembly, or combination; or to write, print, utter, or publish, or cause or procure to be written, &c., or willingly to assist in writing, &c., any false, scandalous, and malicious writing or writings against the government of the United States, or either house of Congress, or the President, with intent to defame them, or to bring them into contempt, or disrepute, or to excite against them the hatred of the people, or to stir up sedition; or to excite any unlawful combination for opposing or resisting any law, or any lawful act of the President; or to resist, oppose, or defeat any such law or act; or to aid, encourage, or abet any hostile designs of any foreign nations against the United States. It provided, however, that the truth of the writing or libel might be given in evidence; and that the jury who tried the cause should have a right to determine the law and the fact, under the direction of the court, as in other cases.

§ 1294. The constitutionality of both the acts was assailed with great earnestness and ability at the time, and was defended with equal masculine vigor. The ground of the advocates, in favor of these laws, was, that they resulted from the right and duty in the government of self-preservation, and the like duty and protection of its functionaries in the proper discharge of their official duties. They were impugned, as not conformable to the letter or spirit of the Constitution; and as inconsistent in their principles with the rights of citizens and the liberty of the press. The alien act was denounced, as exercising a power not delegated by the Constitution; as uniting legislative and judicial functions with that of the executive; and, by this union, as subverting the general principles of free government, and the particular organization and positive provisions of the Constitution. It was added that the sedition act was open to the same objection, and was expressly forbidden by one of the amendments of the Constitution, on which there will be occasion here-

after to comment.¹ At present it does not seem necessary to present more than this general outline, as the measures are not likely to be renewed; and as the doctrines, on which they are maintained and denounced, are not materially different from those which have been already considered.²

¹ The Alien and Sedition acts were the immediate cause of the Virginia Resolutions of December, 1798, and of the elaborate vindication of them, in the celebrated Report of the 7th of January, 1800. The learned reader will there find an ample exposition of the whole constitutional objections. See, also, 4 Jefferson's Correspondence, 23, 27. The reasoning on the other side may be found in the Debates in Congress, at the time of the passage of these acts. It is greatly to be lamented that there is no authentic collection of all the debates in Congress, in a form like that of the Parliamentary Debates. See, also, 4 Elliot's Deb. 251, 252; Debates on the Judiciary, in 1802, Mr. Bayard's Speech, pp. 371, 372; Addison's Charges to the Grand Jury, No. 25, p. 270; Id. No. 26, p. 289. These charges are commonly bound with Addison's Reports. See, also, 1 Tuck. Black. Comm. 296 to 300; Id. Part 2, App. note 6, pp. 11 to 36; Report of Committee of House of Representatives of Congress, 25th February, 1799, and Resolve of Kentucky, of 1798, and Resolve of Massachusetts, of 9th and 13th of February, 1799, on the same subject.

² Mr. Vice-President Calhoun, in his Letter of the 28th of August, 1832, to Gov. Hamilton, uses the following language: "From the adoption of the Constitution we have had but one continued agitation of constitutional questions, embracing some of the most important powers exercised by the government; and yet, in spite of all the ability and force of argument displayed in the various discussions, backed by the high authority claimed for the Supreme Court to adjust such controversies, not a single constitutional question of a political character, which has ever been agitated during this long period, has been settled in the public opinion, *except that of the unconstitutionality of the Alien and Sedition laws*; and, what is remarkable, that was settled *against the decision of the Supreme Court*.' Now, in the first place, the constitutionality of the Alien and Sedition laws never came before the Supreme Court for decision; and, consequently, never was decided by that court. In the next place, what is meant by *public opinion* deciding constitutional questions? What public opinion? Where and at what time delivered? It is notorious that some of the ablest statesmen and jurists of America, at the time of the passage of these acts, and ever since, have maintained the constitutionality of these laws. They were upheld, as constitutional, by some of the most intelligent and able State legislatures in the Union in deliberate resolutions affirming their constitutionality. Nay, more; it may be affirmed, that, at the time when the controversy engaged the public mind most earnestly upon the subject, there was (to say the least of it) as great a weight of judicial and professional talent, learning, and patriotism, enlisted in their favor, as there ever has been against them. If, by being settled by public opinion, is meant that all the people of America were united in one opinion on the subject, the correctness of the statement cannot be admitted, though its sincerity will not be questioned. It is one thing to believe a doctrine universally admitted, because we ourselves think it clear; and quite another thing to establish the fact. The Sedition and Alien laws were generally deemed inexpedient, and therefore any allusion to them now rarely occurs, except in political discussions, when they are introduced to add odium to the party by which they were adopted. But the most serious doubts may be

entertained whether, even in the present day, a majority of constitutional lawyers, or of judicial opinions, deliberately hold them to be unconstitutional.

If public opinion is to decide constitutional questions, instead of the public functionaries of the government, in their deliberate discussions and judgments (a course quite novel in the annals of jurisprudence), it would be desirable to have some mode of ascertaining it in a satisfactory and conclusive form; and some uniform test of it, independent of mere private conjectures. No such mode has, as yet, been provided in the Constitution. And perhaps it will be found, upon due inquiry, that different opinions prevail at the same time, on the same subject, in the north, the south, the east, and the west. If the judgments of the Supreme Court (as it is more than hinted) have not, even upon the most deliberate *juridical* arguments, been satisfactory, can it be expected that *popular* arguments will be more so? It is said, that not a single constitutional question, except that of the Alien and Sedition laws, has ever been settled. If, by this, no more is meant than that all minds have not acquiesced in the decisions, the statement must be admitted to be correct. And such must, under such a postulate, be forever the case with all constitutional questions. It is utterly hopeless in any way to satisfy all minds upon such a subject. But if it be meant that these decisions have not been approved, or acquiesced in, by a majority of the Union, as correct expositions of the Constitution, that is a statement which remains to be proved, and is certainly not to be taken for granted. In truth, it is obvious that, so long as statesmen deny that any decision of the Supreme Court is conclusive upon the interpretation of the Constitution, it is wholly impossible that any constitutional question should ever, in their view, be settled. It may always be controverted; and, if so, it will always be controverted by some persons. Human nature never yet presented the extraordinary spectacle of all minds agreeing in all things; nay, not in all truths, moral, political, civil, or religious. Will the case be better, when twenty-four different States are to settle such questions as they may please, from day to day or year to year, — holding one opinion at one time and another at another? If constitutional questions are never to be deemed settled while any persons shall be found to avow a doubt, what is to become of any government, national or State? Did any statesman ever conceive the project of a constitution of government for a nation or State, every one of whose powers and operations should be liable to be suspended at the will of any one who should doubt their constitutionality? Is a constitution of government made only as a text, about which casuistry and ingenuity may frame endless doubts and endless questions? Or is it made as a fixed system, to guide, to cheer, to support, and to protect the people? Is there any gain to rational liberty, by perpetuating doctrines which leave obedience an affair of mere choice or speculation, now and forever? (a)

(a) The Alien and Sedition acts were, beyond all question, condemned by public sentiment, but that the condemnation, in the minds of any considerable number of the people, is placed on the ground of want of constitutional power is by no means clear. There are many things plainly within its constitutional competence which a prudent government would never venture to do even if so disposed; because of a moral certainty that the temper of the people would not sustain

them in so doing. The Sedition act was clearly in the highest degree impolitic, and, as the prosecutions under it showed, was susceptible of being used for the purposes of oppression and terrorism; and these facts afford reason abundant for its condemnation. It was far from being as questionable in point of constitutional authority as some other acts which have been adopted from a supposed necessity, and enforced almost without objection in troublous times. C.

CHAPTER XXVIII.

POWER OF CONGRESS TO PUNISH TREASON.

§ 1295. AND here, in the order of the Constitution, terminates the section, which enumerates the powers of Congress. There are, however, other clauses, detached from their proper connection, which embrace other powers delegated to Congress, and which, for no apparent reason, have been so detached. As it will be more convenient to bring the whole in review at once, it is proposed (though it is a deviation from the general method of this work) to submit them in this place to the consideration of the reader.

§ 1296. The third section of the third article gives a constitutional definition of the crime of treason (which will be reserved for a separate examination), and then provides: "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

§ 1297. The propriety of investing the national government with authority to punish the crime of treason against the United States could never become a question with any persons who deemed the national government worthy of creation, or preservation. If the power had not been expressly granted, it must have been implied, unless all the powers of the national government might be put at defiance, and prostrated with impunity. Two motives, probably, concurred in introducing it, as an express power. One was, not to leave it open to implication, whether it was to be exclusively punishable with death according to the known rule of the common law, and with the barbarous accompaniments pointed out by it; but to confide the punishment to the discretion of Congress. The other was to impose some limitation upon the nature and extent of the punishment, so that it should not work corruption of blood or forfeiture beyond the life of the offender.

§ 1298. The punishment of high treason by the common law, as stated by Mr. Justice Blackstone,¹ is as follows: 1. That the offender be drawn to the gallows, and not be carried or walk, though usually (by connivance at length ripened into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and cut down alive. 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal. These refinements in cruelty (which, if now practised, would be disgraceful to the character of the age) were, in former times, literally and studiously executed; and indicate at once a savage and ferocious spirit, and a degrading subserviency to royal resentments, real or supposed. It was wise to place the punishment solely in the discretion of Congress; and the punishment has been since declared to be simply death by hanging;² thus inflicting death in a manner becoming the humanity of a civilized society.

§ 1299. It is well known, that corruption of blood, and forfeiture of the estate of the offender followed, as a necessary consequence, at the common law, upon every attainder of treason. By corruption of blood all inheritable qualities are destroyed; so that an attainted person can neither inherit lands nor other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them to any heir. And this destruction of all inheritable qualities is so complete, that it obstructs all descents to his posterity, whenever they are obliged to derive a title through him to any estate of a remote ancestor. So, that if a father commits treason, and is attainted, and suffers death, and then the grandfather dies, his grandson cannot inherit any estate from his grandfather; for he must claim through his father, who could convey to him no inheritable blood.³ Thus the innocent are made the victims of a guilt, in which they did not, and perhaps could not, participate; and the sin is visited upon remote generations. In addition to this most grievous disability, the person attainted forfeits, by the common

¹ 4 Black. Comm. 92.

² Act of 30th April, 1790, ch. 36.

³ 2 Black. Comm. 252, 253; 4 Black. Comm. 388, 389.

law, all his lands, and tenements, and rights of entry, and rights of profits in lands or tenements, which he possesses. And this forfeiture relates back to the time of the treason committed, so as to avoid all intermediate sales and incumbrances; and he also forfeits all his goods and chattels from the time of his conviction.¹ (a)

§ 1300. The reasons commonly assigned for these severe punishments, beyond the mere forfeiture of the life of the party attainted, are these: By committing treason the party has broken his original bond of allegiance, and forfeited his social rights. Among these social rights, that of transmitting property to others is deemed one of the chief and most valuable. Moreover, such forfeitures, whereby the posterity of the offender must suffer, as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has to keep him from offending.² But this view of the subject is wholly unsatisfactory. It looks only to the offender himself, and is regardless of his innocent posterity. It really operates as a posthumous punishment upon them; and compels them to bear, not only the disgrace naturally attendant upon such flagitious crimes; but takes from them the common rights and privileges enjoyed by all other citizens, where they are wholly innocent, and however remote they may be in the lineage from the first offender. It surely is enough for society to take the life of the offender, as a just punishment of his crime, without taking from his offspring and relatives that property, which may be the only means of saving them from poverty and ruin. It is bad policy, too; for it cuts off all the attachments, which these unfortunate victims might otherwise feel for their own government, and prepares them to engage in any other service, by which their supposed injuries may be redressed, or their hereditary hatred gratified.³ Upon these and similar grounds, it may be presumed, that the clause was first introduced into the original draft of the Constitution; and, after some

¹ 4 Black. Comm. 381 to 388.

² 4 Black. Comm. 382. See also Yorke on Forfeitures.

³ See Rawle on Const. ch. 11, pp. 145, 146.

(a) But forfeiture, except for the life of the person attainted, is now abolished in England. Stat. 3 & 4 Will. IV. c. 106.

amendments, it was adopted without any apparent resistance.¹ By the laws since passed by Congress, it is declared, that no conviction or judgment, for any capital or other offences, shall work corruption of blood, or any forfeiture of estate.² (a) The history of other countries abundantly proves, that one of the strong incentives to prosecute offences, as treason, has been the chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge; of gratifying its envy of the rich and good; and of increasing its means to reward favorites, and secure retainers for the worst deeds.³

§ 1301. The power of punishing the crime of treason against the United States is exclusive in Congress; and the trial of the offence belongs exclusively to the tribunals appointed by them. A State cannot take cognizance, or punish the offence; whatever it may do in relation to the offence of treason, committed exclusively against itself, if, indeed, any case can, under the Constitution, exist, which is not at the same time treason against the United States.⁴

¹ Journal of Convention, 221, 269, 270, 271.

² Act of 1790, ch. 36, § 24.

³ See 1 Tuck. Black. Comm. App. 275, 276; Rawle on Const. ch. 11, pp. 143 to 145.

⁴ See *The People v. Lynch*, 11 Johns R. 553; Rawle on Const. ch. 11, pp. 140, 142, 143; *Id.* ch. 21, p. 207; Sergeant on Const. ch. 30 [ch. 32].

(a) But on the breaking out of the civil war in 1861 new acts were passed for the punishment of treason, and for the confiscation of the property of rebels. The punishment of treason may now at the discretion of the court be fine and imprisonment. Act of July 17, 1862, 12 Stat. at Large, 589. A question having

been made whether the fee in the real estate of rebels might not be confiscated, it was expressly provided in the confiscation acts that no punishment or proceedings should be construed to work a forfeiture of the real estate of the offender, longer than his natural life. See *Bigelow v. Forrest*, 9 Wall. 339.

CHAPTER XXIX.

POWER OF CONGRESS AS TO PROOF OF STATE RECORDS AND PROCEEDINGS.

§ 1302. THE first section of the fourth article declares: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and *the effect thereof*." (a)

§ 1303. The articles of confederation contained a provision on the same subject. It was, that "full faith and credit shall be given in each of the States to the records, acts, and judicial proceedings of the courts and magistrates of every other State."¹ It has been said, that the meaning of this clause is extremely indeterminate; and that it was of but little importance under any interpretation which it would bear.² The latter remark may admit of much question, and is certainly quite too loose and general in its texture. But there can be no difficulty in affirming, that the authority given to Congress, under the Constitution, to prescribe the form and effect of the proof is a valuable improvement, and confers additional certainty as to the true nature and import of the clause. The clause, as reported in the first draft of the Constitution, was, "that full faith and credit shall be given in each State to the *acts of the legislature*, and to the records and judicial proceedings of the courts and magistrates of every other State." The amendment was subsequently reported substantially in the form in which it now stands, except that the words in the introductory clause were, "Full faith and credit *ought* to be given" (instead of "*shall*"); and, in the next clause, the "*legislature shall*" (instead of, "*the Congress may*"); and in the concluding

¹ Art. 4.

² The Federalist, No. 42.

(a) See *Cole v. Cunningham*, 133 U. S. 592; *Board of Public Works v. Columbia College*, 17 Wall. 521.

clause, "and the effect, *which judgments obtained in one State shall have in another*" (instead of, "*and the effect thereof*"). The latter was substituted by the vote of six States against three; the others were adopted without opposition; and the whole clause, as thus amended, passed without any division.¹

§ 1304. It is well known, that the laws and acts of foreign nations are not judicially taken notice of in any other nation; and that they must be proved, like any other facts, whenever they come into operation or examination in any forensic controversy. The nature and mode of the proof depend upon the municipal law of the country where the suit is depending; and there are known to be great diversities in the practice of different nations on this subject. Even in England and America, the subject, notwithstanding the numerous judicial decisions which have from time to time been made, is not without its difficulties and embarrassments.²

§ 1305. Independent of the question as to *proof*, there is another question, as to the *effect* which is to be given to foreign judgments, when duly authenticated, in the tribunals of other nations, either as matter to maintain a suit, or to found a defence to a suit. Upon this subject, also, different nations are not entirely agreed in opinion or practice. Most, if not all of them, profess to give some effect to such judgments; but many exceptions are allowed, which either demolish the whole efficiency of the judgments, as such, or leave it open to collateral proofs, which in a great measure impair its validity. To treat suitably of this subject would require a large dissertation, and appropriately belongs to another branch of public law.³

§ 1306. The general rule of the common law, recognized both

¹ Journal of Convention, pp. 228, 305, 320, 321.

² See Starkie on Evid. P. 2, § 92, p. 251, and note to American ed. P. 4, p. 569; Appleton v. Braybrook, 6 M. & Selw. 34; Livingston v. Maryland Insurance Company, 6 Cranch, 274; Talbot v. Seeman, 1 Cranch, 1, 38; Raynham v. Canton, 3 Pick. R. 293; Consequa v. Willings, 1 Peters's Cir. R. 225, 229; Church v. Hubbard, 2 Cranch, 187, 238; Yeaton v. Fry, 5 Cranch, 335, 343; Picton's Case, 24 Howell's State Trials, 494, &c.; Vandervoort v. Smith, 3 Caines's R. 155; Delafield v. Hurd, 3 Johns. R. 310. See also Pardessus, Cours de Droit Commer. P. 6, tit. 7, ch. 2 *partout*.

³ See authorities in preceding note, and Walker v. Whittier, 1 Doug. R. 1; Phillips v. Hunter, 2 H. Bl. 409; Johnson's Dig. of New York Rep. Evid. V.; Starkie on Evidence, P. 2, § 67, p. 206; Id. § 68, p. 214; Bissell v. Briggs, 9 Mass. R. 462; Bigelow's Digest, Evid. C., Judgment, D. E. F. H. I.; Hitchcock v. Aicken, 1 Caines's R. 460.

in England and America, is, that foreign judgments are *prima facie* evidence of the right and matter which they purport to decide. At least, this may be asserted to be in England the preponderating weight of opinion, (a) and in America it has been held, upon many occasions,¹ (b) though its correctness has been recently questioned, upon principle and authority, with much acuteness.²

§ 1307. Before the revolution, the colonies were deemed foreign to each other, as the British colonies are still deemed foreign to the mother country, and, of course, their judgments were deemed foreign judgments within the scope of the foregoing rule.³ It followed, that the judgments of one colony were deemed re-examinable in another, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent in which they were then understood to be re-examinable in England. In some of the colonies, however, laws had been passed, which put judgments in the neighboring colonies upon a like footing with domestic judgments, as to their conclusiveness, when the court possessed jurisdiction.⁴ The

¹ See authorities in preceding notes; and Starkie on Evid. P. 2, § 67; pp. 206 to 216, and notes of American ed. Id.; Plummer v. Woodbourne, 4 Barn. & Cressw. 625.

² Starkie on Evid. P. 2, § 67, pp. 206 to 216; Bigelow's Dig. Evid. C. and cases cited in Kames's Equity, B. 3, ch. 8, p. 375; Story on Conf. of Laws, § 608, and cases cited.

³ Bissell v. Briggs, 9 Mass. R. 462; Commonwealth v. Green, 17 Mass. R. 515, 543.

⁴ This was done in Massachusetts by the Provincial act of 14 Geo. III., ch. 2, as to judgments of the courts of the neighboring colonies. See Bissell v. Briggs, 9 Mass. R. 462, 465; Ancient Colony and Province Laws [ed. 1814], p. 684.

(a) The rule of conclusiveness on the merits is now the settled rule of the courts of England. Bank of Australasia v. Nias, 16 Q. B. 717; Scott v. Pilkington, 2 Best & S. 11; Godard v. Gray, L. R. 6 Q. B. 139; Castrique v. Imrie, L. R. 4 H. L. 414; *In re Trufort*, 36 Ch. D. 600. Bigelow, Estoppel, 261, 5th ed. But it is also held, in the latest English authority, that fraud may be shown against the foreign judgment though that be to try the facts of the case again. Vadala v. Lawes, 25 Q. B. D. 310, by the Court of Appeal, following Aboulloff v. Oppenheimer, 10 Q. B. D. 295, also by the Court of Appeal. But see *contra*, Castrique v. Behrens, 2 El. & E. 209; Flower v. Lloyd, 10 Ch. D. 327, 333,

by James and Thesiger, L. JJ. Further, see Bigelow, Estoppel, 254, 255, 5th ed.

(b) In Lazier v. Westcott, 26 N. Y. 146, it is said, "The rule may now be regarded as firmly settled in England, that the judgment is conclusive, so far as to preclude a retrial upon the merits. It remains competent for the defendant to show that the foreign court had not jurisdiction of the subject-matter of the writ, or that he was never served with process, or that the judgment was fraudulently obtained. Henderson v. Henderson, 6 Q. B. 288; Ferguson v. Mahon, 11 Ad. & El. 38; Ricardo v. Garcias, 12 Cl. & Fin. 368; Bank of Australasia v. Nias, 16 Q. B. 717." And in support of the same doc

reasonable construction of the article of the confederation on this subject is, that it was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them. It is probable, that it did not invariably, and perhaps not generally, receive such a construction; and the amendment in the Constitution was, without question, designed to cure the defects in the existing provision.¹

§ 1308. The clause of the Constitution propounds three distinct objects: first, to declare, that full faith and credit shall be given the records, &c. of every other State; secondly, to prescribe the manner of authenticating them; and thirdly, to prescribe their effect, when so authenticated. The first is declared and established by the Constitution itself, and is to receive no aid, nor is it susceptible of any qualification by Congress. The other two are expressly subjected to the legislative power.

§ 1309. Let us then examine, what is the true meaning and interpretation of each section of the clause. "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." The language is positive, and declaratory, leaving nothing to future legislation. "Full faith and credit *shall* be given;" what, then, is meant by full faith and credit? Does it import no more than that the same faith and credit are to be given to them, which, by the comity of nations, is ordinarily conceded to all foreign judgments? Or is it intended to give them a more conclusive efficiency, approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive as to the merits? The latter seems to be the true object of the clause; and, indeed, it seems difficult to assign any other adequate motive for the insertion of the clause, both in the confederation and in the Constitution. The framers of both in-

¹ See *Kibbe v. Kibbe*, 1786, Kirby, R. 119; *James v. Allen*, 1786, 1 Dall. R. 188; *Phelps v. Holker*, 1788, 1 Dall. R. 261; 3 Jour. of Congress, 12 Nov. 1777, p. 493; s. c. 1 Secret Journal, p. 366; *Hitchcock v. Aicken*, 1 Caines's R. 460, 478, 479.

trine are cited *Taylor v. Bryden*, 8 Johns. 173; *Monroe v. Douglas*, 4 Sandf. Ch. 126; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Story, Conf. of Laws*, § 607. Further, see *Bigelow, Estoppel*, ch. 6, 5th ed.

A foreign judgment *in rem* is conclusive everywhere. *Eunis v. Smith*, 14 How. 400; and see *Monroe v. Douglas*, 4 Sandf. Ch. 126.

struments must be presumed to have known, that by the general comity of nations, and the long-established rules of the common law, both in England and America, foreign judgments were *prima facie* evidence of their own correctness. They might be impugned for their injustice, or irregularity; but they were admitted to be a good ground of action here, and stood firm, until impeached and overthrown by competent evidence introduced by the adverse party. It is hardly conceivable, that so much solicitude should have been exhibited to introduce, as between confederated States, much less between States united under the same national government, a clause merely affirmative of an established rule of law, and not denied to the humblest or most distant foreign nation. It was hardly supposable, that the States would deal less favorably with each other on such a subject, where they could not but have a common interest, than with foreigners. A motive of a higher kind must naturally have directed them to the provision. It must have been, "to form a more perfect union," and to give to each State a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all. There could be no reasonable objection to such a course. On the other hand, there were many reasons in its favor. The States were united in an indissoluble bond with each other. The commercial and other intercourse with each other would be constant, and infinitely diversified. Credit would be everywhere given and received; and rights and property would belong to citizens of every State in many other States than that in which they resided. Under such circumstances, it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one State, should be open to litigation again and again, as often as either of the parties, or their privies, should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and re-examine all the merits of the case. It might be done at a distance from the original place of the transaction; after the removal or death of witnesses, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavorable to a just understanding of the case.

§ 1310. If it should be said, that the judgment might be unjust upon the merits, or erroneous in point of law, the proper answer is, that if true, that would furnish no ground for interference; for the evils of a new trial would be greater than it would cure. Every such judgment ought to be presumed to be correct, and founded in justice. And what security is there, that the new judgment, upon the re-examination, would be more just, or more conformable to law, than the first? What State has a right to proclaim, that the judgments of its own courts are better founded in law or in justice than those of any other State? The evils of introducing a general system of re-examination of the judicial proceedings of other States, whose connections are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases.¹ Motives of this sort, founded upon an enlarged confidence and reciprocal duties, might well be presumed to have entered into the minds of the framers of the confederation, and the Constitution. They intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the States, such as belonged to those of all foreign nations and tribunals; but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated.² (a)

¹ *Green v. Sarmiento*, 1 Peters's Cir. R. 74, 78 to 80; *Hitchcock v. Aicken*, 1 Caines's R. 462.

² *Green v. Sarmiento*, 1 Peters's Cir. R. 74, 80, 81; *Bissell v. Briggs*, 9 Mass. R. 462, 467; *Commonwealth v. Green*, 17 Mass. R. 515, 544, 545.

(a) It was undoubtedly the purpose of this provision of the Constitution to give to the judicial proceedings of each State the same faith and credit in every other State to which they were entitled in the State in which they took place. *Hampton v. McConnell*, 3 Wheat. 234; *Mayhew v. Thatcher*, 6 Wheat. 129. And consequently no defence could be made to a judgment in another State which would be precluded by the law of the State in which it was rendered. *Armstrong v. Carson*, 2 Dall. 300; *Jacquette v. Hugonon*, 2 McLean, 129; *Christmas v. Russell*, 5 Wall. 290; *Green v. Van Buskirk*, 7 Wall. 139; *Cheever v. Wilson*, 9 Wall.

108; *Board of Public Works v. Columbia College*, 17 Wall. 521; *Robertson v. Pickrell*, 109 U. S. 608. But it gives them no greater credit; and consequently the defences which were available in the State where it was rendered, are available elsewhere. *Mills v. Duryee*, 7 Cranch, 484; *Hampton v. McConnell*, 3 Wheat. 234; *Warren Manuf. Co. v. Ætna Ins. Co.*, 2 Paine, 502; *Bank of the State v. Dalton*, 9 How. 525; *Pennoyer v. Neff*, 95 U. S. 714. If the record of a judgment or other sufficient evidence in regard to it, shows that it was rendered without the court having jurisdiction of the party, it will be treated as void in every other State, not-

§ 1311. The next clause of the section is, "And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, — *and the effect thereof.*" It is obvious, that this clause, so far as it authorizes Congress to prescribe the mode of authentication, is wholly beside the purpose of the preceding. Whatever may be the faith and credit due to the public acts, records, and proceedings of other States, whether *prima facie* evidence only, or conclusive evidence; still the mode of establishing them in proof is of very great importance, and upon which a diversity of rules exists in different countries. The object of the present provision is to introduce uniformity in the rules of proof (which could alone be done by Congress). It is certainly a great improvement upon the parallel article of the confederation. That left it wholly to the States themselves to require any proof of public acts, records, and proceedings, which they might from time to time deem advisable; and where no rule was prescribed, the subject was open to the decision of the judicial tribunals, according to their own views of the local usage and jurisprudence. Many embarrassments must necessarily have grown out of such a state of things. The provision, therefore, comes recommended by every consideration of wisdom and convenience, of public peace and private security.

withstanding this constitutional provision. *Lincoln v. Tower*, 2 McLean, 478; *Westerwelt v. Lewis*, Id. 511; *Thurber v. Blackburne*, 1 N. H. 242; *Hall v. Williams*, 6 Pick. 232; *Gleason v. Dodd*, 4 Met. 333; *Commonwealth v. Blood*, 97 Mass. 538; *Folger v. Ins. Co.*, 99 Mass. 267; *Aldrich v. Kinney*, 4 Conn. 380; *Wood v. Watkinson*, 17 Conn. 500; *Kilburn v. Woodworth*, 5 Johns. 37; *Starbuck v. Murray*, 5 Wend. 148; *Bradshaw v. Heath*, 13 Wend. 407; *Kerr v. Kerr*, 41 N. Y. 272; *Bimeler v. Dawson*, 4 Scam. 536; *Warren v. McCarthy*, 21 Ill. 95; *Rape v. Heaton*, 9 Wis. 328; *Norwood v. Cobb*, 24 Texas, 551; *McLaurine v. Monroe*, 30 Mo. 462. See *Gruner v. United States*, 11 How. 163; *Harris v. Hardeman*, 14 How. 334. The courts may stay proceedings upon a judgment rendered in another State, if they have personal jurisdiction. *Cole v. Cuning-*

ham, 133 U. S. 107. So, too, they may act upon the defendant personally, to give effect to the judgment. *Ibid.*; *Phelps v. McDonald*, 99 U. S. 298.

Evidence is admissible in contradiction of the recitals of the record, for the purpose of showing a want of jurisdiction. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight Co.*, 19 Wall. 58; *Pennoyer v. Neff*, 95 U. S. 714; *Hanley v. Donoghue*, 116 U. S. 1; *Wright v. Andrews*, 130 Mass. 149; *Napton v. Leaton*, 71 Mo. 358. See also *Cole v. Cunningham*, 133 U. S. 107; *Dobson v. Pearce*, 12 N. Y. 156.

The conclusiveness of a judgment, however, does not preclude other States legislating on the subject of the *remedy* that may be had upon such judgment when it is sought to be enforced therein. *McElmoyle v. Cohen*, 13 Pet. 312.

§ 1312. But the clause does not stop here. The words added are, "and the effect thereof." Upon the proper interpretation of these words some diversity of opinion has been judicially expressed. Some learned judges have thought, that the word "thereof" had reference to the proof, or authentication; so as to read, "and to prescribe the effect of such proof, or authentication." Others have thought, that it referred to the antecedent words, "acts, records, and proceedings;" so as to read, "and to prescribe the effect of such acts, records, and proceedings."¹ Those who were of opinion that the preceding section of the clause made judgments in one State conclusive in all others, naturally adopted the former opinion; for otherwise the power to declare the effect would be wholly senseless; or Congress could possess the power to repeal or vary the full faith and credit given by that section. Those who were of opinion that such judgments were not conclusive, but only *prima facie* evidence, as naturally embraced the other opinion; and supposed, that until Congress should, by law, declare what the effect of such judgment should be, they remained only *prima facie* evidence.

§ 1313. The former seems now to be considered the sounder interpretation. But it is not, practically speaking, of much importance which interpretation prevails; since each admits the competency of Congress to declare the effect of judgments, when duly authenticated; so always, that full faith and credit are given to them; and Congress by their legislation have already carried into operation the objects of the clause. The act of 26th of May, 1790, ch. 39 (ch. 11), after providing for the mode of authenticating the acts, records, and judicial proceedings of the States, has declared, "and the said records and judicial proceedings, authenticated as aforesaid, shall have *such* faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."² It has been settled upon solemn argument, that this enactment does declare the effect of the records, as evidence, when duly authenticated. It gives them the same faith

¹ See *Bissell v. Briggs*, 9 Mass. R. 462, 467; *Hitchcock v. Aicken*, 1 Caines's R. 460; *Green v. Sarmiento*, 1 Peters's Cir. R. 74; *Field v. Gibbs*, Id. 155; *Commonwealth v. Green*, 17 Mass. R. 515, 544, 545.

² By the act of 27th March, 1804, ch. 56, the provisions of the act of 1790 are enlarged, so as to cover some omissions, such as State office books, the records of territorial courts, &c.

and credit as they have in the State court from which they are taken. If in such court they have the faith and credit of the highest nature, that is to say, of *record* evidence, they must have the same faith and credit in every other court. So, that Congress have declared the *effect* of the records, by declaring, what degree of faith and credit shall be given to them. If a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere. If re-examinable there, it is open to the same inquiries in every other State.¹ It is, therefore, put upon the same footing as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given to pronounce it; or the right of the State itself to exercise authority over the persons, or the subject-matter. The Constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory.² (a)

¹ *Mills v. Duryee*, 7 Cranch, R. 481; *Hamden v. M'Connell*, 3 Wheat. R. 234; 1 Kent's Comm. Lect. 12, pp. 243, 244; Sergeant on Const. ch. 31 [ch. 33].

² *Biasell v. Briggs*, 9 Mass. R. 462, 467; *Shumway v. Stillman*, 4 Cowen's R. 292; *Borden v. Fitch*, 15 Johns. R. 121.

(a) Story on Conf. of Laws, § 609; *v. Watkinson*, 17 Conn. 500; *D'Arcy v. McElmoyle v. Cohen*, 13 Pet. 312; *Wood Ketchum*, 11 Howard, 165.

CHAPTER XXX.

POWERS OF CONGRESS — ADMISSION OF NEW STATES, AND
ACQUISITION OF TERRITORY.

§ 1314. THE third section of the fourth article contains two distinct clauses. The first is: "New States may be admitted by the Congress into this Union. But no new States shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislature of the States concerned, as well as of the Congress."

§ 1315. A clause on this subject was introduced into the original draft of the Constitution, varying in some respects from the present, and especially in requiring the consent of two-thirds of the members present of both houses to the admission of any new State. After various modifications, attempted or carried, the clause substantially in its present form was agreed to by the vote of eight States against three.¹

§ 1316. In the articles of confederation no provision is to be found on this important subject. Canada was to be admitted of right, upon her acceding to the measures of the United States. But no other colony (by which was evidently meant no other British colony) was to be admitted, unless by the consent of nine States.² The eventual establishment of new States within the limits of the Union seems to have been wholly overlooked by the framers of that instrument.³ In the progress of the revolution it was not only perceived that, from the acknowledged extent of the territory of several of the States, and its geographical position, it might be expedient to divide it into two States; but a much more interesting question arose, to whom of right belonged the vacant territory appertaining to the crown at the time of the revolution, whether to the States, within whose chartered limits it was situated, or to the Union in its federative capacity. This was a subject

¹ Journal of Convention, pp. 222, 307, 308, 309, 310, 311, 365, 385.

² Article 11.

³ The Federalist, No. 43.

of long and ardent controversy, and (as has been already suggested) threatened to disturb the peace, if not to overthrow the government of the Union.¹ It was upon this ground, that several of the States refused to ratify the articles of confederation, insisting upon the right of the confederacy to a portion of the vacant and unpatented territory included within their chartered limits. Some of the States most interested in the vacant and unpatented western territory at length yielded to the earnest solicitations of Congress on this subject.² To induce them to make liberal cessions, Congress declared that the ceded territory should be disposed of for the common benefit of the Union, and formed into republican States, with the same rights of sovereignty, freedom, and independence, as the other States; to be of a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square; and that the reasonable expenses incurred by the State, since the commencement of the war, in subduing British posts, or in maintaining and acquiring the territory, should be reimbursed.³

§ 1317. Of the power of the general government thus constitutionally to acquire territory under the articles of the confederation, serious doubts were at the time expressed; more serious than, perhaps, upon sober argument, could be justified. It is difficult to conceive, why the common attribute of sovereignty, the power to acquire lands by cession or by conquest, did not apply to the government of the Union, in common with other sovereignties; unless the declaration, that every power not *expressly* delegated was retained by the States, amounted to (which admitted of some doubt) a constitutional prohibition.⁴ Upon more than one occasion it has been boldly pronounced to have been founded in usurpation. "It is now no longer," said the Federalist in 1788, "a point of speculation and hope, that the western

¹ 2 Pitk. Hist. ch. 11, pp. 17, 19, 24, 27, 28, 29 to 32; Id. 32 to 36; 1 Kent's Comm. Lect. 10, pp. 197, 198. See also, 1 Secret Journals of Congress in 1775, pp. 368 to 386; Id. 433 to 438; Id. 445, 446.

² 1 Tuck. Black. Comm. App. 283, 284, 285, 286; 2 Pitkin's Hist. ch. 11, pp. 33 to 36; 1 U. S. Laws (Duane & Bioren's Edition), pp. 467, 472; ante, vol. 1, §§ 227, 228.

³ See 1 Secret Journals of Congress, 6th Sept. 1780, pp. 440 to 444; 6 Journal of Congress, 10th Oct. 1780, p. 213; 2 Pitkin's Hist. ch. 11, pp. 34, 35, 36; 7 Journal of Congress, 1st March, 1781, pp. 43 to 48; Land Laws of U. S., Introductory chapter, 1 U. S. Laws, p. 452 (Duane & Bioren's Edition).

⁴ See Amer. Insur. Company v. Canter, 1 Peters's Sup. R. 511, 542.

territory is a mine of vast wealth to the United States; and although it is not of such a nature as to extricate them from their present distresses, or for some time to come to yield any regular supplies for the public expenses, yet it must hereafter be able, under proper management, both to effect a gradual discharge of the domestic debt, and to furnish for a certain period liberal tributes to the federal treasury. A very large proportion of this fund has been already surrendered by individual States; and it may with reason be expected, that the remaining States will not persist in withholding similar proofs of their equity and generosity. We may calculate, therefore, that a rich and fertile soil, of an area equal to the inhabited extent of the United States, will soon become a national stock. Congress have assumed the administration of this stock. They have begun to make it productive. Congress have undertaken to do more; they have proceeded to form new States; to erect temporary governments; to appoint officers for them; and to prescribe the conditions on which such States shall be admitted into the confederacy. *All this has been done, and done without the least color of constitutional authority.* Yet no blame has been whispered, and no alarm has been sounded.”¹

§ 1318. The truth is, that the importance, and even justice, of the title to the public lands, on the part of the federal government, and the additional security which it gave to the Union, overcame all scruples of the people as to its constitutional character. The measure to which the Federalist alludes in such emphatic terms is the famous ordinance of Congress, of the 13th of July, 1787, which has ever since constituted, in most respects, the model of all our territorial governments; and is equally remarkable for the brevity and exactness of its text, and for its masterly display of the fundamental principles of civil and religious liberty. It begins by providing a scheme for the descent and distributions of estates equally among all the children, and their representatives, or other relatives of the deceased in equal degree, making no distinction between the whole and half blood; and for the mode of disposing of real estate by will, and by conveyances. It then proceeds to provide for the organization of the territorial governments, according to their progress in population, confiding the whole power to a governor and judges in the first instance, subject to the control of

¹ The Federalist, Nos. 38, 42, 43.

Congress. As soon as the territory contains five thousand inhabitants, it provides for the establishment of a general legislature, to consist of three branches, a governor, a legislative council, and a house of representatives ; with a power to the legislature to appoint a delegate to Congress. It then proceeds to state certain fundamental articles of compact between the original States and the people and States in the territory, which are to remain unalterable, unless by common consent. The first provides for freedom of religious opinions and worship. The second provides for the right to the writ of *habeas corpus* ; for the trial by jury ; for a proportionate representation in the legislature ; for judicial proceedings according to the course of the common law ; for capital offences being bailable ; for fines being moderate, and punishments not cruel or unusual ; for no man's being deprived of his liberty or property, but by the judgment of his peers, or the law of the land ; for full compensation for property taken, or services demanded for the public exigencies ; " and for the just preservation of rights and property, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever *interfere with, or affect private contracts or engagements, bona fide*, and without fraud previously formed." The third provides for the encouragement of religion, and education, and schools, and for good faith and due respect for the rights and property of the Indians. The fourth provides, that the territory and States formed therein shall forever remain a part of the confederacy, subject to the constitutional authority of Congress ; that the inhabitants shall be liable to be taxed proportionately for the public expenses ; that the legislatures in the territory shall never interfere with the primary disposal of the soil by Congress, nor with their regulations for securing the title to the soil to purchasers ; that no tax shall be imposed on lands, the property of the United States ; and non-resident proprietors shall not be taxed more than residents ; that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free. The fifth provides, that there shall be formed in the territory not less than three, nor more than five States with certain boundaries ; and whenever any of the said States shall contain 60,000 free inhabitants, such State shall (and may before) be admitted by its delegates into Congress on an equal footing with the original States in all respects whatever, and shall be at liberty

to form a permanent Constitution and State government, provided it shall be republican, and in conformity to these articles of compact. The sixth and last provides, that there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes; but fugitives from other States, owing service therein, may be reclaimed.¹ Such is a brief outline of this most important ordinance, the effects of which upon the destinies of the country have already been abundantly demonstrated in the territory, by an almost unexampled prosperity and rapidity of population, by the formation of republican governments, and by an enlightened system of jurisprudence. Already three States, composing a part of that territory, have been admitted into the Union; and others are fast advancing towards the same grade of political dignity.²

§ 1319. It was doubtless with reference principally to this territory, that the article of the Constitution, now under consideration, was adopted. The general precaution, that no new States shall be formed without the concurrence of the national government, and of the States concerned, is consonant to the principles which ought to govern all such transactions. The particular precaution against the erection of new States by the partition of a State without its own consent, will quiet the jealousy of the larger States; as that of the smaller will also be quieted by a like precaution against a junction of States without their consent.³ Under this provision no less than eleven States have, in the space of little more than forty years, been admitted into the Union upon an equality with the original States. And it scarcely requires the spirit of prophecy to foretell, that in a few years the predominance of numbers, of population, and of power will be unequivocally transferred from the old to the new States. May the patriotic wish be forever true to the fact, *felix prole parens*.

§ 1320. Since the adoption of the Constitution, large acquisi-

¹ See 3 Story's Laws of United States, App. 2073, &c.; 1 Tuck. Black. Comm. App. 278, 282.

² In Mr. Webster's Speech on Mr. Foote's Resolution, in January, 1830, there is a very interesting and powerful view of this subject, which will amply repay the diligence of a deliberate perusal. See Webster's Speeches, &c. pp. 360 to 364; Id. 369. It is well known that the ordinance of 1787 was drawn by the Hon. Nathan Dane of Massachusetts, and adopted with scarcely a verbal alteration by Congress. It is a noble and imperishable monument to his fame.

³ The Federalist, No. 43.

tions of territory have been made by the United States, by the purchase of Louisiana and Florida, and by the cession of Georgia, which have greatly increased the contemplated number of States. The constitutionality of the two former acquisitions, though formerly much questioned, is now considered settled beyond any practical doubt.¹

§ 1321. At the time when the preliminary measures were taken for the admission of the State of Missouri into the Union, an attempt was made to include a restriction, prohibiting the introduction of slavery into that State, as a condition of the admission. On that occasion the question was largely discussed, whether Congress possessed a constitutional authority to impose such a restriction, upon the ground that the prescribing of such a condition is inconsistent with the sovereignty of the State to be admitted, and its equality with the other States. The final result of the vote which authorized the erection of that State seems to establish the rightful authority of Congress to impose such a restriction, although it was not then applied. In the act passed for this purpose, there is an express clause, that in all the territory ceded by France to the United States under the name of Louisiana, which lies north of 36° 30' N. lat., not included within the limits of the State of Missouri, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby forever prohibited.² An objection of a similar character was taken to the compact between Virginia and Kentucky, upon the ground that it was a restriction upon State sovereignty. But the Supreme Court had no hesitation in overruling it, considering it as opposed by the theory of all free governments, and especially of those which constitute the American Republic.³ (a)

¹ See ante, §§ 1278 to 1283; *American Insurance Company v. Canter*, 1 Peters's Sup. R. 511, 542.

² Act 6 March, 1820, ch. 20. The same subject was immediately afterwards much discussed in the State legislatures; and opposite opinions were expressed by different States in the form of solemn resolutions.

³ *Green v. Biddle*, 8 Wheat. R. 1, 87, 88.

(a) The prohibition of slavery in all territory north of 36° 30' contained in the Missouri Act was unsatisfactory to many southern statesmen at the time, and became more and more so as the result

proved the free States likely to acquire a decided preponderance in the Union. Finally, in the case of *Dred Scott v. Sandford*, 19 How. 395, decided in 1857, the majority of the Supreme Court declared

its opinion that Congress had no constitutional power to impose any such restriction. This declaration, however, was *obiter*, and not generally acquiesced in by the people of the northern States; and though the influence of Mr. Buchanan's administration was cast in its favor, it continued to be vigorously opposed until an administration succeeded, which had been chosen by those who opposed it, and which disregarded it altogether. During

that administration came the civil war, and as the result of that the entire abolition of slavery. By the complete emancipation of slaves, the declaration in the Dred Scott case here alluded to became of little importance, except as a significant event in the history of the times. The opinions delivered in that case were very able, and were ably reviewed by Mr. Thomas H. Benton, among others. C.

CHAPTER XXXI.

POWERS OF CONGRESS — TERRITORIAL GOVERNMENTS.

§ 1322. THE next clause of the same article is, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." The proviso thus annexed to the power is certainly proper in itself, and was probably rendered necessary by the jealousies and questions concerning the western territory, which have been already alluded to under the preceding head.¹ It was perhaps suggested by the clause in the ninth article of the confederation, which contained a proviso, "that no State shall be deprived of territory for the benefit of the United States."

§ 1323. The power itself was obviously proper, in order to escape from the constitutional objection already stated to the power of Congress over the territory ceded to the United States under the confederation. The clause was not in the original draft of the Constitution; but was added by the vote of ten States against one.²

§ 1324. As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any State. It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any government at all.³ (a) In cases of conquest, the usage of the

¹ The Federalist, No. 43 ; ante, ch. 30.

² Journal of Convention, pp. 228, 310, 311, 365.

³ American Insurance Co. v. Canter, 1 Peters's Sup. R. 511, 542, 543 ; Id. 517, Mr. Justice Johnson's opinion.

(a) Within a few years the doctrine that the people of the territories were entitled of right to govern themselves, and notably by Mr. Cass and Mr. Douglass, at the proper time to originate and organ-

world is, if a nation is not wholly subdued, to consider the conquered territory as merely held by military occupation, until its fate shall be determined by a treaty of peace. But during this intermediate period it is exclusively subject to the government of the conqueror. In cases of confirmation or cession by treaty, the acquisition becomes firm and stable; and the ceded territory becomes a part of the nation to which it is annexed, either on terms stipulated in the treaty, or on such as its new master shall impose. The relations of the inhabitants with each other do not change; but their relations with their former sovereign are dissolved; and new relations are created between them and their new sovereign. The act transferring the country transfers the allegiance of its inhabitants. But the general laws, not strictly political, remain as they were, until altered by the new sovereign. If the treaty stipulates that they shall enjoy the privileges, rights, and immunities of citizens of the United States, the treaty, as a part of the law of the land, becomes obligatory in these respects. Whether the same effects would result from the mere fact of their becoming inhabitants and citizens by the cession, without any express stipulation, may deserve inquiry, if the question should ever occur. But they do not participate in political power; nor can they share in the powers of the general government, until they become a State, and are admitted into the Union, as such. Until that period, the territory remains subject to be governed in such manner as Congress shall direct, under the clause of the Constitution now under consideration.¹

§ 1325. No one has ever doubted the authority of Congress to erect territorial governments within the territory of the United States, under the general language of the clause, "to make all needful rules and regulations." (a) Indeed, with the ordinance of

¹ *American Insurance Company v. Canter*, 1 Peters's Sup. R. 511, 542, 543.

ize State governments. This doctrine will be found presented by Mr. Douglass, in "Harper's Magazine" for 1859, under the title "Popular Sovereignty in the Territories." See Political Text Book for 1860, p. 132. See also, Cutts's Party Questions, and the Nicholson Letter in Smith's Life of Cass, 607, which presents the views of Mr. Cass.

(a) This was denied by Mr. Cass in his

letter to Nicholson (1847), and by Mr. Douglass in his essay on Popular Sovereignty in "Harper's Magazine" (1859). Both these gentlemen insisted that the word "territory" in this clause of the Constitution was used to designate the unappropriated lands which the United States owned, and not the people who might become organized into political communities outside the limits of States.

1787 in the very view of the framers, as well as of the people of the States, it is impossible to doubt that such a power was deemed indispensable to the purposes of the cessions made by the States. So that, notwithstanding the generality of the objection (already examined), that Congress have no power to erect corporations, and that in the convention the power was refused, we see that the very power is an incident to that of regulating the territory of the United States; that is, it is an appropriate means of carrying the power into effect.¹ What shall be the form of government established in the territories depends exclusively upon the discretion of Congress. Having a right to erect a territorial government, they may confer on it such powers, legislative, judicial, and executive, as they may deem best. They may confer upon it general legislative powers, subject only to the laws and Constitution of the United States. If the power to create courts is given to the territorial legislature, those courts are to be deemed strictly territorial; and in no just sense constitutional courts, in which the judicial power conferred by the Constitution can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory of the United States.² The power is not confined to the territory of the United States, but extends to "other property belonging to the United States;" so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood and acted upon.

§ 1326. As if it were not possible to confer a single power upon the national government, which ought not to be a source of jealousy, the present has not been without objection. It has been suggested, that the sale and disposal of the western territory may become a source of such immense revenue to the national government, as to make it independent of and formidable to the people. To amass immense riches, it has been said, to defray the expenses of ambition, when occasion may prompt, without seeming to oppress the people, has uniformly been the policy of tyrants. Should such

¹ See *ante*. §§ 1265, 1266; 4 Jefferson's Corresp. 523, 525; Hamilton on the Bank of U. S., 1 Hamilton's Works, 121, 127 to 131; Id. 135, 147, 151; Id. 114, 115; Act of Congress, 7th Aug. 1789, ch. 8.

² *American Insurance Company v. Canter*, 1 Peters's Sup. R. 511, 546.

a policy creep into our government, and the sales of the public lands, instead of being appropriated to the discharge of the public debt, be converted to a treasure in a bank, those, who at any time can command it, may be tempted to apply it to the most nefarious purposes. The improvident alienation of the crown lands in England has been considered as a circumstance extremely favorable to the liberty of the nation, by rendering the government less independent of the people. The same reason will apply to other governments whether monarchical or republican.¹

§ 1327. What a strange representation is this of a republican government, created by, and responsible to, the people in all its departments! What possible analogy can there be between the possession of large revenues in the hands of a monarch and large revenues in the possession of a government whose administration is confided to the chosen agents of the people for a short period, and may be dismissed almost at pleasure? If the doctrine be true, which is here inculcated, a republican government is little more than a dream, however its administration may be organized; and the people are not worthy of being trusted with large public revenues, since they cannot provide against corruption, and abuses of them. Poverty alone, it seems, gives a security for fidelity; and the liberties of the people are safe, only when they are pressed into vigilance by the power of taxation. In the view of this doctrine, what is to be thought of the recent purchases of Louisiana and Florida? If there was danger before, how mightily must it be increased by the accession of such a vast extent of territory, and such a vast increase of resources? Hitherto the experience of the country has justified no alarms on this subject from such a source. On the other hand, the public lands hold out, after the discharge of the national debt, ample revenues to be devoted to the cause of education and sound learning, and to internal improvements, without trenching upon the property, or embarrassing the pursuits of the people by burdensome taxation. The constitutional objection to the appropriation of the other revenues of the government to such objects, has not been supposed to apply to an appropriation of the proceeds of the public lands. The cessions of that territory were expressly made for the common benefit of the United States; and, therefore, constitute a fund,

¹ 1 Tuck. Black. Comm. App. 284.

which may be properly devoted to any objects which are for the common benefit of the Union.¹

§ 1328. The power of Congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled.² (a) But the power of Congress to regulate the other national property (unless it has acquired by cession of the States exclusive jurisdiction) is not necessarily exclusive in all cases. If the national government own a fort, arsenal, hospital, or light-house establishment, not so ceded, the general jurisdiction of the State is not excluded in regard to the site, but, subject to the rightful exercise of the powers of the national government, it remains in full force.³

§ 1329. There are some other incidental powers given to Congress, to carry into effect certain other provisions of the Constitution. But they will most properly come under consideration in a

¹ 1 Kent's Comm. Lect. 12, pp. 242, 243; Id. Lect. 17, p. 359.

² Rawle on Const. ch. 27, p. 237; 1 Kent's Comm. Lect. 12, p. 243; Id. Lect. 17, pp. 359, 360.

³ Rawle on Const. ch. 27, p. 240; *The People v. Godfrey*, 17 Johns. R. 225; *Commonwealth v. Young*, 1 Hall's Journal of Jurisp. 47; *Sergeant on Const.* ch. 31 [ch. 33]. Whether the general doctrine in the case of *Commonwealth v. Young* (1 Hall's Journal, 47) can be maintained, in its application to that case, is quite a different question.

(a) This point became at length the subject of serious and dangerous dispute between political parties, in consequence of the effect it might have upon slavery, and its extension into the territories. One party insisted that slavery was recognized by the Constitution; that masters of slaves had a right to remove with them into the new territories, and be protected in their right thereto, not only by the courts, but, if need be, by express legislation of Congress also. Another party, deeming slavery an evil, and asserting for Congress full control over the subject in the territories, demanded legislation which should preclude its extension into them. A third party denied to Congress the power to legislate on the domestic concerns of the people of the territories; asserted their right to regulate them in

their own discretion, and at the proper time to be admitted to the Union with a constitution of their adoption, with or without slavery as they might choose.

These parties were severally represented in the presidential election of 1860, by Mr. Breckenridge, Mr. Lincoln, and Mr. Douglass; but the recent extinction of slavery having removed the chief occasion for questioning the power of Congress as asserted by the author, it has since been exercised without much question, except on the part of the people of Utah, who have not readily acquiesced in the legislation against polygamy. For some judicial discussion of the right of Congress over the territories, see further, *American Ina. Co. v. Canter*, 1 Pet. 542; *United States v. Gratiot*, 14 Pet. 537; *Cross v. Harrison*, 16 How. 164.

future part of these Commentaries. At present it may suffice to say, that, with reference to due energy in the government, due protection of the national interests, and due security to the Union, fewer powers could scarcely have been granted without jeopardizing the whole system. Without the power of the purse, the power to declare war or to promote the common defence or general welfare, would have been wholly vain and illusory. Without the power exclusively to regulate commerce, the intercourse between the States would have been constantly liable to domestic dissensions, jealousies, and rivalries, and the intercourse with foreign nations would have been liable to mischievous interruptions from secret hostilities or retaliatory restrictions. The other powers are principally auxiliary to these; and are dictated at once by an enlightened policy, a devotion to justice, and a regard to the permanence (may it ripen into a perpetuity!) of the Union.¹

¹ Among the extraordinary opinions of Mr. Jefferson, in regard to government in general, and especially to the government of the United States, none strikes the calm observer with more force than the cool and calculating manner in which he surveys the probable occurrence of domestic rebellions. "I am," he says, "not a friend to a very energetic government. It is always oppressive. It places the governors, indeed, more at their ease at the expense of the people. The late rebellion in Massachusetts [in 1787] has given more alarm than I think it should have done. Calculate, that one rebellion in thirteen States, in the course of eleven years, is but one for each State in a century and a half. *No country should be so long without one.* Nor will any degree of power in the hands of government prevent insurrections." Letter to Mr. Madison, in 1787; 2 Jefferson's Corresp. 276. Is it not surprising that any statesman should have overlooked the horrible evils and immense expenses which are attendant upon every rebellion? The loss of life, the summary exercise of military power, the desolations of the country, and the inordinate expenditures to which every rebellion must give rise? Is not the great object of every good government to preserve and perpetuate domestic peace and the security of property, and the reasonable enjoyment of private rights and personal liberty? If a State is to be torn into factions and civil wars every eleven years, is not the whole Union to become a common sufferer? How and when are such wars to terminate? Are the insurgents to meet victory or defeat? Has not history established the melancholy truth, that constant wars lead to military dictatorship and despotism, and are inconsistent with the free spirit of republican governments? If the tranquillity of the Union is to be disturbed every eleventh year by a civil war, what repose can there be for the citizens in their ordinary pursuits? Will they not soon become tired of a republican government which invites to such eternal contests, ending in blood, and murder, and rapine? One cannot but feel far more sympathy with the opinion of Mr. Jefferson in the same letter, in which he expounds the great political maxim, "Educate and inform the whole mass of the people." 2 Jefferson's Corresp. 276. (a)

(a) If Mr. Jefferson was willing to witness rebellion as a check upon power, Mr. Hamilton, it might be said, was disposed to look with complacency upon war as a means of strengthening the government. "He trusted," says Mr. Gouveneur

§ 1330. As there are incidental powers belonging to the United States, in their sovereign capacity, so there are incidental rights, obligations, and duties. It may be asked how these are to be ascertained. In the first place, as to duties and obligations of a public nature, they are to be ascertained by the law of nations, to which, on asserting our independence, we necessarily become subject. In regard to municipal rights and obligations, whatever differences of opinion may arise in regard to the extent to which the common law attaches to the national government, no one can doubt that it must and ought to be resorted to, in order to ascertain many of its rights and obligations. Thus, when a contract is entered into by the United States, we naturally and necessarily resort to the common law, to interpret its terms and ascertain its obligations. The same general rights, duties, and limitations, which the common law attaches to contracts of a similar character between private individuals, are applied to the contracts of the government. Thus, if the United States become the holder of a bill of exchange, they are bound to the same diligence, as to giving notice, in order to charge an indorser, upon the dishonor of the bill, as a private holder would be.¹ In like manner, when a bond is entered into by a surety for the faithful discharge of the duties of an office by his principal, the nature and extent of the obligation created by the instrument are constantly ascertained by reference to the common law; though the bond is given to the government in its sovereign capacity.²

¹ *United States v. Barker*, 12 Wheat. R. 559.

² See, among other cases, *United States v. Kirkpatrick*, 9 Wheat. R. 720; *Farrar v. United States*, 5 Peters's R. 373; *Smith v. United States*, 5 Peters's R. 294; *United States v. Tingey*, 5 Peters's R. 115; *United States v. Buford*, 3 Peters's R. 12, 30.

Morris, Life II. 361, "that in the changes and chances of time we should be involved in some war which might strengthen our Union and nerve the executive." It is but just to these eminent statesmen to bear in mind, when considering such language, especially when employed unguardedly in private correspondence or

conversation, that while each was ardently devoted to the liberties of the country, they respectively apprehended danger to those liberties from opposite quarters; Mr. Jefferson from the usurpations of rulers, Mr. Hamilton from the insubordination of the multitude. C.

CHAPTER XXXII.

PROHIBITIONS ON THE UNITED STATES.

§ 1331. HAVING finished this review of the powers of Congress, the order of the subject next conducts us to the prohibitions and limitations upon these powers which are contained in the ninth section of the first article. Some of these have already been under discussion, and therefore will be pretermitted.¹

§ 1332. The first clause is as follows: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

§ 1333. The corresponding clause of the first draft of the Constitution was in these words: "No tax or duty shall be laid, &c., on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited." In this form it is obvious that the migration and importation of slaves, which was the sole object of the clause, was, in effect, perpetuated, so long as any State should choose to allow the traffic. The subject was afterwards referred to a committee, who reported the clause substantially in its present shape; except that the limitation was the year one thousand eight hundred, instead of one thousand eight hundred and eight. The latter amendment was substituted by the vote of seven States against four; and, as thus amended, the clause was adopted by the like vote of the same States.²

§ 1334. It is to the honor of America, that she should have set

¹ Those which respect taxation and the regulation of commerce have been considered under former heads, to which the learned reader is referred. *Ante*, Vol. I., ch. 14, 15.

² Journ. of Convention, pp. 222, 275, 276, 285, 291, 292, 358, 378; 2 Pitk. Hist. ch. 20, pp. 261, 262. It is well known, as an historical fact, that South Carolina and Georgia insisted upon this limitation as a condition of the union. See 2 Elliot's Deb. 335, 336; 3 Elliot's Deb. 97.

the first example of interdicting and abolishing the slave-trade in modern times. It is well known, that it constituted a grievance, of which some of the colonies complained before the revolution, that the introduction of slaves was encouraged by the crown, and that prohibitory laws were negatived.¹ It was doubtless to have been wished, that the power of prohibiting the importation of slaves had been allowed to be put into immediate operation, and had not been postponed for twenty years. But it is not difficult to account, either for this restriction, or for the manner in which it is expressed.² It ought to be considered, as a great point gained in favor of humanity, that a period of twenty years might forever terminate, within the United States, a traffic which has so long and so loudly upbraided the barbarism of modern policy. Even within this period, it might receive a very considerable discouragement, by curtailing the traffic between foreign countries; and it might even be totally abolished by the concurrence of a few States.³ "Happy," it was then added by the Federalist, "would it be for the unfortunate Africans, if an equal prospect lay before them of being redeemed from the oppressions of their European brethren."⁴ Let it be remembered that, at this period, this horrible traffic was carried on with the encouragement and support of every civilized nation of Europe; and by none with more eagerness and enterprise than by the parent country. America stood forth alone, uncheered and unaided, in stamping ignominy upon this traffic on the very face of her constitution of government, although there were strong temptations of interest to draw her aside from the performance of this great moral duty.

§ 1335. Yet attempts were made to pervert this clause into an objection against the Constitution, by representing it, on one side, as a criminal toleration of an illicit practice; and on another, as calculated to prevent voluntary and beneficial emigrations to

¹ See 2 Elliot's Debates, 335; 1 Secret Journal of Congress, 378, 379.

² See 3 Elliot's Debates, 98, 250, 251; 3 Elliot's Debates, 335 to 338. In the original draft of the Declaration of Independence by Mr. Jefferson, there is a very strong paragraph on this subject, in which the slave-trade is denounced "as a piratical warfare, the opprobrium of infidel powers, and the warfare of the Christian king of Great Britain, determined to keep open a market where men should be bought and sold;" and it is added, that "he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce." 1 Jefferson's Correspondence, 146, in the fac-simile of the original.

³ The Federalist, No. 42.

⁴ Id. No. 42.

America.¹ Nothing, perhaps, can better exemplify the spirit and manner in which the opposition to the Constitution was conducted, than this fact. It was notorious, that the postponement of an immediate abolition was indispensable to secure the adoption of the Constitution. It was a necessary sacrifice to the prejudices and interests of a portion of the Southern States.² The glory of the achievement is scarcely lessened by its having been gradual, and by steps silent, but irresistible.

§ 1336. Congress lost no time in interdicting the traffic, as far as their power extended, by a prohibition of American citizens carrying it on between foreign countries. And as soon as the stipulated period of twenty years had expired, Congress, by a prospective legislation to meet the exigency, abolished the whole traffic in every direction to citizens and residents. Mild and moderate laws were, however, found insufficient for the purpose of putting an end to the practice; and at length Congress found it necessary to declare the slave-trade to be a piracy, and to punish it with death.³ Thus it has been elevated in the catalogue of crimes to this "bad eminence" of guilt; and has now annexed to it the infamy, as well as the retributive justice, which belongs to an offence equally against the laws of God and man, the dictates of humanity, and the solemn precepts of religion. Other civilized nations are now alive to this great duty; and by the noble exertions of the British government, there is now every reason to believe that the African slave-trade will soon become extinct; and thus another triumph of virtue would be obtained over brutal violence and unfeeling cruelty.⁴

§ 1337. This clause of the Constitution, respecting the importation of slaves, is manifestly an exception from the power of regulating commerce. Migration seems appropriately to apply to voluntary arrivals, as importation does to involuntary arrivals; and, so far as an exception from a power proves its existence, this proves, that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men

¹ The Federalist, No. 42; 2 Elliot's Debates, 335, 336; 3 Elliot's Debates, 250, 251.

² 2 Elliot's Debates, 335, 336; 1 Lloyd's Debates, 305 to 313; 2 Elliot's Debates, 97; Id. 250, 251; 1 Elliot's Debates, 60; 1 Tuck. Black. Comm. App. 290.

³ Act of 1820, ch. 113.

⁴ See 1 Kent's Comm. Lect. 9, pp. 179 to 187.

who pass from place to place voluntarily, as to those who pass involuntarily.¹

§ 1338. The next clause is, "The privilege of the writ of *habeas corpus* (a) shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

§ 1339. In order to understand the meaning of the terms here used, it will be necessary to have recourse to the common law; for in no other way can we arrive at the true definition of the writ of *habeas corpus*. At the common law there are various writs, called writs of *habeas corpus*. But the particular one here spoken of is that great and celebrated writ, used in all cases of illegal confinement, known by the name of the writ of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.² It is, therefore, justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge. This writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may be; for every restraint upon a man's liberty is, in the eye of the law, an imprisonment, whatever may

¹ *Gibbons v. Ogden*, 9 Wheat. R. 1, 216, 217; *Id.* 206, 207, 211; *Id.* 230.

² 3 Black. Comm. 131.

(a) State authorities detaining officers of the United States for acts done under the Constitution or laws of the national government may be required by the federal judiciary to release them under this writ. *In re Nagle*, 135 U. S. 1. This case, together with *Ex parte Royall*, 117 U. S. 241, has given color for a new doctrine concerning the writ of *habeas corpus*; to wit, the right of the federal courts to resort to that process in the *midst* of a State prosecution, and not merely to resort to it before indictment. The proposition itself seems rather startling, but the use of the writ in such cases will doubtless be very

exceptional, and permitted only in the clearest and most urgent cases of danger to the federal government. Where there is no ground to doubt the fairness of the State tribunals, the courts of the United States will probably hesitate long before granting the writ. On the whole, it is hardly to be assumed that any new doctrine seriously affecting the general law and practice in the matter of the *habeas corpus* has been established or was intended. See *Allen v. Black*, 43 Fed. Rep. 228; *United States v. Fiscus*, 42 Fed. Rep. 395; *In re Harmon*, 43 Fed. Rep. 372.

be the place, or whatever may be the manner, in which the restraint is effected.¹

§ 1340. Mr. Justice Blackstone has remarked with great force, that "to bereave a man of life, or by violence to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person by secretly hurrying him to jail where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary force."² While the justice of the remark must be felt by all, let it be remembered, that the right to pass bills of attainder in the British Parliament still enables that body to exercise the summary and awful power of taking a man's life, and confiscating his estate, without accusation or trial. The learned commentator, however, has slid over this subject with surprising delicacy.³

§ 1341. In England this is a high prerogative writ, issuing out of the Court of King's Bench, not only in term time, but in vacation, and running into all parts of the king's dominions; for it is said, that the king is entitled, at all times, to have an account why the liberty of any of his subjects is restrained. It is grantable, however, as a matter of right, *ex merito jussitæ* upon the application of the subject.⁴ In England, however, the benefit of it was often eluded prior to the reign of Charles the Second; and especially during the reign of Charles the First. These pitiful evasions gave rise to the famous Habeas Corpus Act of 31 Car. II. c. 2, which has been frequently considered as another Magna Charta in that kingdom; and has reduced the general method of proceedings on these writs to the true standard of law and liberty.⁵ That statute has been, in substance, incorporated into the jurisprudence of every State in the Union; and the right to it has been secured in most, if not in all, of the State constitutions, by a provision similar to that existing in the Constitution of the United States.⁶ It is not without reason, therefore,

¹ 2 Kent's Comm. Lect. 24, p. 22, &c. (2d edit. pp. 26 to 32).

² 1 Black. Comm. 136.

³ 4 Black. Comm. 259.

⁴ 4 Inst. 290; 1 Kent's Comm. Lect. 24, p. 22 (pp. 26 to 32); 3 Black. Comm. 133.

⁵ 3 Black. Comm. 135, 136; 2 Kent's Comm. Lect. 24, pp. 22, 23 (2d edit. pp. 26 to 32).

⁶ 2 Kent's Comm. Lect. 24, pp. 23, 24 (2d edit. pp. 26 to 32).

that the common law was deemed by our ancestors a part of the law of the land, brought with them upon their emigration, so far as it was suited to their circumstances; since it affords the amplest protection for their rights and personal liberty. Congress have vested in the courts of the United States full authority to issue this great writ, in cases falling properly within the jurisdiction of the national government.¹ (a)

§ 1342. It is obvious, that cases of a peculiar emergency may arise which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has upon various pretexts and occasions been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten,² the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it; a very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution.³ It would

¹ *Ex parte Bollman*, etc. 4 Cranch, 75.

² 3 Black. Comm. 137, 138; 1 Tuck. Black. Comm. App. 291, 292.

³ Mr. Jefferson expressed a decided objection against the power to suspend the writ of *habeas corpus* in any case whatever, declaring himself in favor of "the eternal and unremitting force of the *habeas corpus* laws." 2 Jefferson's Corresp. 274, 291. — "Why," said he on another occasion, "suspend the writ of *habeas corpus* in insurrections and rebellions?" — "If the public safety requires that the government should have a man imprisoned on less probable testimony in those, than in other emergencies, let him be taken and tried, *retaken and retried*, while the necessity continues, only giving him redress against the government for damages." 2 Jefferson's Corresp. 344. Yet the only attempt ever made in Congress to suspend the writ of *habeas corpus* was during his administration, on occasion of the supposed treasonable conspiracy of Col. Aaron Burr. Mr. Jefferson sent a message to Congress on the subject of that conspiracy, on 22d January, 1807. On the next day, Mr. Giles of the senate moved a committee to consider the expediency of suspending the writ of *habeas corpus* be appointed, and the motion prevailed. The committee (Mr. Giles, chairman) reported a bill for this purpose. The bill passed the Senate, and was rejected in the House of Representatives by a vote of 113 for the rejection, against 19 in its favor. See 3 Senate Journal, 22d January, 1807, p. 127; *Id.* 130, 131. 5 Journal of House of Representatives, 26th January, 1807, pp. 550, 551, 552.

(a) See the Statutes, 1 Stat. at Large, 81; 4 *Id.* 634; 5 *Id.* 539; 14 *Id.* 385; Cooley Const. Lim. 345, 346.

seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body.¹ (a)

¹ *Martin v. Mott*, 12 Wheat. R. 19. See also 1 Tuck. Comm. App. 292; 1 Kent's Comm. Lect. 12 (2d edit. pp. 262 to 265).

(a) The power to suspend the writ of *habeas corpus* for the first time became the subject of earnest controversy during the late civil war. On the 27th of April, 1861, before the passage of any statute on the subject, the President addressed to Lieut. Gen. Scott the following order:—

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington, you find resistance which renders it necessary to suspend the writ of *habeas corpus*, for the public safety, you personally, or through the officer in command, at the point at which resistance occurs, are authorized to suspend that writ.

ABRAHAM LINCOLN.

By the President.

WM. H. SEWARD,
Secretary of State.

Similar orders were afterwards issued for other lines and places.

On May 25, 1867, John Merryman of Baltimore was arrested, charged with various acts of treason, and confined in Fort McHenry, then in command of Gen. Geo. Cadwallader. He immediately applied to Chief Justice Taney for a writ of *habeas corpus*, which was granted and served upon Gen. Cadwallader, who refused to comply with the exigency thereof, on the ground that the privilege of the writ had been suspended by the President for the public safety. Thereupon an attachment was issued against him for this refusal, but the officer was not suffered to enter the fort to serve the same. It being thus made apparent that it was impossible to

enforce obedience to the writ, the chief justice contented himself with putting on file an opinion in which he denied the authority of the President to suspend the writ of *habeas corpus* in his own discretion, and gave reasons for his opinion that that authority was vested by the Constitution in Congress. *Ex parte Merryman*, Taney's Decisions; McPherson's History of the Rebellion, 155; 9 Am. Law Reg. N. S. 527. This opinion was controverted by Attorney-General Bates, and by other eminent lawyers, including Mr. Horace Binney, Mr. Reverdy Johnson, and Prof. Theophilus Parsons, but was warmly supported by others. On the third of March, 1863, Congress passed an act providing among other things that the President, during the existing rebellion, whenever in his opinion the public safety might require it, was authorized to suspend the writ of *habeas corpus* in any case, throughout the United States or any part thereof, and that whenever such suspension should take place, no military or other officer should be compelled, in answer to any writ of *habeas corpus*, to return the body of any person held by him by authority of the President; but upon the certificate under oath of the officer having charge of any one so detained, that such person is so detained under the authority of the President, further proceedings under the writ should be suspended, so long as the suspension by the President should remain in force and the rebellion continue. The same act provided that "any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any

§ 1343. The next clause is, "No bill of attainder or *ex post facto* law shall be passed."

§ 1344. Bills of attainder, as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties.¹ But in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties; for the Supreme Court have said, "A bill of attainder may affect the life of an individual, or may confiscate his property, or both."² In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. Such acts have been often resorted to in foreign governments, as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching as well to the absent and the dead as to

¹ 2 Woodeson's Law Lect. 622.

² Fletcher v. Peck, 6 Cranch, R. 138; 1 Kent's Comm. Lect. 19, p. 382.

search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress." See this act considered in *McCall v. McDowell*, 1 Abb. U. S. R. 212.

Except in *Merryman's Case*, the question whether the power to suspend the writ of *habeas corpus* was, under the Constitution, in the President or in Congress, does not appear to have received much attention in the courts, though vehemently discussed in pamphlets and serial publications. In *McCall v. McDowell*, *supra*, Deady, District Judge, says: "There are some things too plain for argument, and

one of them is, that by the Constitution of the United States, the President has not the power to suspend the privilege of the writ, and Congress has. The power of the President is executive power: a power to execute the laws, and not to suspend them. The latter is a legislative function, and, so far as it exists, belongs naturally, and by force of the Constitution, to Congress:" p. 235. See also opinion of Smalley, D. J., in *Ex parte Field*, 5 Blatch. 63. As to the danger of abuse of this power, see Mr. Burke's Letter to the Sheriffs of Bristol; also May's Constitutional History of England, ch. XI. C.

the living. Sir Edward Coke¹ has mentioned it to be among the transcendent powers of Parliament, that an act may be passed to attain a man after he is dead. And the reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of Parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor.² The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender.³ The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens.⁴ Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.⁵ (a)

¹ 4 Coke, Inst. 36, 37.

² 2 Woodeson's Lect. 623, 624.

³ 2 Woodeson's Lect. 624.

⁴ Dr. Paley has strongly shown his disapprobation of laws of this sort. I quote from him a short but pregnant passage. "This fundamental rule of civil jurisprudence is violated in the case of acts of attainder or confiscation, in bills of pains and penalties, and in all *ex post facto* laws whatever, in which Parliament exercises the double office of legislature and judge. And whoever either understands the value of the rule itself, or collects the history of those instances in which it has been invaded, will be induced, I believe, to acknowledge that it had been wiser and safer never to have departed from it. He will confess, at least, that nothing but the most manifest and immediate peril of the commonwealth will justify a repetition of these dangerous examples. If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community as may arise from the infraction of a rule, upon which the purity of public justice and the existence of civil liberty essentially depend."

⁵ See 1 Tuck. Black. Comm. App. 292, 293; Rawle on Const. ch. 10, p. 119. See Cooper v. Telfair, 4 Dall. R. 14. Mr. Woodeson, in his Law Lectures (Lect. 41), has devoted a whole lecture to this subject, which is full of instruction, and will reward the diligent perusal of the student. 2 Woodeson's Law Lect. 621. During the American revolution, this power was used with a most unsparing hand; and it has been a matter of regret in succeeding times, however much it may have been applauded *flagrante bello*.

(a) For some information regarding revolution, see Belknap's History of New bills of attainder during the American Hampshire, ch. 26; 2 Ramsay's History

§ 1345. Of the same class are *ex post facto* laws, that is to say (in a literal sense), laws passed after the act done.(a) The

of South Carolina, 351 ; 8 Rhode Island Colonial Records, 609 ; 2 Arnold's History of Rhode Island, 360, 449 ; Thompson v. Carr, 5 N. H. 511 ; Sleight v. Kane, 2 Johns. Cas. 236 ; Cooper v. Telfair, 4 Dall. 14 ; Hylton v. Brown, 1 Wash. C. C. 307 ; De Lancey v. McKeen, Id. 354. Some of the best patriots and most eminent statesmen of the period defended them as wise and necessary. See Hawley's letter to Gerry, Life of Gerry by Austin, vol. i. p. 106. This is not surprising, when we consider that coolness, caution, and a strict regard for the rights and liberties of others, are the accompaniments of conscious security and strength, and are not to be looked for in times of great danger, when the people regard their all as being staked upon the issue of a doubtful contest, and when it is of the utmost importance to their cause, that by every possible means they force doubtful parties to take sides with them, and lessen the power, number, and means of offence of those opposed. When the issue of the late rebellion remained in suspense (July 2, 1862), Congress, by "an act to prescribe an oath of office," and for other purposes, enacted that, "hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, take and subscribe the following oath or affirmation : I, A. B., do solemnly swear or affirm that I have never voluntarily borne arms against the United States since I have been a citizen thereof ; and that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility

thereto ; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United States ; that I have not yielded a voluntary support to any pretended government, authority, power, or Constitution within the United States hostile or inimical thereto. And I do further swear or affirm that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic ; that I will bear true faith and allegiance to the same ; that I take this obligation freely, without any mental reservation or purpose of evasion ; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God." On the 24th of January, 1865, the following supplementary act was passed : "No person after the date of this act shall be admitted to the bar of the Supreme Court of the United States, or, at any time after the 4th of March next, shall be admitted to the bar of any Circuit or District Court of the United States, or of the Court of Claims, as an attorney or counsellor of such court, or shall be allowed to appear or to be heard in any such court by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath " above recited. See 12 Stat. at Large, 502 ; 13 Id. 424. This last act came under review in *Ex parte Garland*, 4 Wall. 333, and by a majority of the court was adjudged to be void as in the nature of a bill of attainder. The attorney and counsellor, it was said, " clothed with his office, does not hold it as a matter of grace and favor. The

(a) A statute may combine retrospective and prospective criminal legislation ; in so far as the two are separable, the

latter part would be good. *Jackson v. People*, 128 U. S. 189.

terms, *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or a criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States.¹ As an original question, the argument would

¹ Mr. Justice Johnson's Opinion in *Satterlee v. Mathewson*, 2 Peters's R. 416, and note, Id. App. 681, &c. ; 2 Elliot's Debates, 353 ; 4 Wheat. R. 578, note ; Ogden v. Saunders, 12 Wheat. R. 286.

right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency. The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution : " p. 379.

"The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as a punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind

partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included : " p. 377.

In *Cummings v. Missouri*, 4 Wall. 277, a clause in the constitution of Missouri, which required a similar oath of priests and clergymen, as a condition to the right to the continued exercise of their profession, was held to be a bill of attainder on the like reasoning. In each of these cases four of the justices, — Chief Justice Chase, and Justices Miller, Swayne, and Davis, dissented.

Besides the discussion of the term "bills of attainder" which was had in these cases, much of interest will be found in the cases of *Blair v. Ridgeley*, 41 Mo. 63 ; *Ex parte Law*, decided by Mr. Justice Erskine in the U. S. Dist. Court of Georgia, May term, 1866. See also *State v. Staten*, 6 Cold. 248 ; *Randolph v. Good*, 3 W. Va. 551 ; *State v. Adams*, 44 Mo. 570 ; *Beirne v. Brown*, 4 W. Va. 72 ; *Pierce v. Carskadon*, Id. 234.

A provision of the constitution of Missouri, forbidding civil actions against any party for any act done or performed by him during the rebellion by virtue of the military authority vested in him by the government of the United States, or of the State, to do such act, or in pursuance to orders received by him to do such act from any person vested with such authority, is not a bill of attainder. *Drehman v. Stifle*, 8 Wall. 595. C.

be entitled to grave consideration; but the current of opinion and authority has been so generally one way, as to the meaning of this phrase in the State constitutions, as well as in that of the United States, ever since their adoption, that it is difficult to feel that it is now an open question.¹ (a) The general interpretation has been, and is, that the phrase applies to acts of a criminal nature only; (b) and that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime when done; or whereby the act, if a crime, is aggravated in enormity or punishment; or whereby different, or less evidence, is required to convict an offender than was required when the act was committed. The supreme court have given the following definition: "An *ex post facto* law is one, which renders an act punishable in a manner in which it was not punishable when it was committed."² (c) Such a law

¹ See *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch, 138; *The Federalist*, Nos. 44, 84; *Journ. of Convention*, Supp. p. 431; 2 *Amer. Mus.* 536; 2 *Elliot's Debates*, 343, 352, 354; *Ogden v. Saunders*, 12 Wheat. R. 266, 303, 329, 330, 335; 1 *Kent's Comm. Lect.* 19, pp. 381, 382.

² *Fletcher v. Peck*, 6 Cranch, 138.

(a) See *Society, &c. v. Wheeler*, 2 Gallis. 105; *Satterlee v. Mathewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Pet. 110; *Charles River Bridge v. Warren Bridge*, 11 Pet. 421; *Carpenter v. Pennsylvania*, 17 How. 463; *Cummings v. Missouri*, 4 Wall. 277; *Kring v. Missouri*, 107 U. S. 221; *Ex parte Medley*, 134 U. S. 160. The State decisions have been to the same effect. In *Ex parte Medley*, *supra*, there is a striking illustration of the text. A statute of Colorado passed after the conviction of the petitioner for murder, under which statute he had been sentenced, had provided that persons convicted of murder, and sentenced to death, should be kept in solitary confinement until the infliction of the death penalty. The former law had no such provision. The statute was held to be an *ex post facto* law. The majority treated the change in the law as an added infamy; and such indeed was the language of the preamble of the statute. A new provision allowing the warden of the penitentiary to fix a time for execution within a week of the

same, to be kept secret, was also deemed to be within the constitutional declaration against *ex post facto* laws. Brewer and Bradley, JJ., dissented, and as this writer conceives, on solid grounds.

Divorce, not being a punishment, may be authorized for causes happening previous to the passage of the divorce act. *Carson v. Carson*, 40 Miss. 349.

(b) *Freeland v. Williams*, 131 U. S. 405, where it is laid down that retrospective statutes not of a criminal nature are not forbidden, though they affect the rights of parties in existence.

(c) The Supreme Court of the United States has no right to pronounce an act of the legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase *ex post facto* laws is not applicable to civil laws, but to

may inflict penalties on the person, or may inflict pecuniary penalties, which swell the public treasury.¹(a) Laws, however, which mitigate the character or punishment of a crime already committed, may not fall within the prohibition, for they are in favor of the citizen.²(b)

¹ Fletcher v. Peck, 6 Cranch, 138.

² Rawle on Constitution, ch. 10, p. 119 ; 1 Tuck. Black. Comm. App. 293 ; 1 Kent's Comm. Lect. 19, pp. 381, 382 ; Sergeant on Constitution, ch. 28 [ch. 30] ; Calder v. Bull, 3 Dall. R. 386.

penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings, which impose penalties or forfeitures, and not to civil proceedings which affect private right retrospectively. Per Mr. Justice Story, in *Watson v. Mercer*, 8 Peters, 110. Further, see *Sturges v. Carter*, 114 U. S. 511.

(a) If the penalty is for the benefit of private parties, it may be equally obnoxious to this provision. *Falconer v. Campbell*, 2 M'Lean, 212. And a law which by way of punishment deprives persons of the privilege of following their lawful trade or calling is also within the inhibitions of the Constitution. *Cummings v. Missouri*, 4 Wall. 277 ; *Ex parte Garland*, Id. 333. So, to deprive a party of a protection ensured to him by an amnesty law, by repealing such law, has been held to be, as to him, *ex post facto*. *State v. Keith*, 63 N. C. 140.

(b) See *Strong v. State*, 1 Blackf. 193 ; *Woart v. Winnick*, 3 N. H. 473 ; *State v. Arlin*, 39 N. H. 180 ; *Keen v. State*, 3 Chand. (Wis.) 109 ; *Boston Cummins*, 16 Ga. 102 ; *Clarke v. State*, 23 Miss. 261 ; *Maul v. State*, 25 Texas, 166 ; *Hartung v. People*, 22 N. Y. 105 ; *Ratzky v. People*, 29 N. Y. 124 ; *Turner v. State*, 40 Ala. 21. It will be seen that in some cases it has been found difficult to determine what change in a punishment is to be regarded as in mitigation thereof. It is agreed that as regards modes and forms

of procedure in bringing parties to punishment for alleged criminal acts, changes may be made in the discretion of the legislature, and the changes applied to previous facts without infringing upon this provision of the Constitution. A few of the most striking cases may be referred to. It has been held that a law is not to be regarded as *ex post facto* which precludes a defendant on trial for an alleged offence previous to its passage from taking advantage of variances which do not prejudice him : *Commonwealth v. Hall*, 97 Mass. 570. Nor one which authorizes the amendment of indictments : *State v. Manning*, 14 Texas, 402 ; *Lesure v. State*, 19 Ohio, N. S. 43 ; *State v. Corson*, 59 Me. 137. Nor one which gives the government additional challenges : *Walston v. Commonwealth*, 16 B. Monr. 15 ; *State v. Ryan*, 13 Minn. 370 ; *State v. Wilson*, 48 N. H. 398 ; *Commonwealth v. Dorsey*, 103 Mass. 412. Nor one authorizing the change of venue in a criminal case : *Gut v. State*, 9 Wall. 35. Nor one which, in providing for the punishment of future offences, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated in reference to it : *Ross's Case*, 2 Pick. 165 ; *Riley's Case*, Id. 172 ; *Rand v. Commonwealth*, 9 Grat. 738 ; *People v. Butler*, 3 Cow. 347. But the change must not be in the direction of depriving the accused party of any substantial protection established with a view to insuring a fair trial on the merits. In *Hart v. State*, 40 Ala. 21, a statute providing that the rule of law precluding a

§ 1346. The next clause (passing by such as have been already considered) is, "No money shall be drawn from the treasury but in consequence of appropriations made by law. And a regular statement and account of the receipts and expenditures of all public moneys shall be published from time to time."

§ 1347. This clause was not in the original draft of the Constitution; but the first part was subsequently introduced upon a report of a committee; and the latter part was added at the very close of the convention.¹

§ 1348. The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that Congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation, and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation. In arbitrary governments, the prince levies what money he pleases from his subjects, disposes of it as he thinks proper, and is beyond responsibility or reproof. It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defence and the general welfare. Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may

¹ Journal of Convention, 219, 328, 345, 358, 378.

conviction on the uncorroborated testimony of an accomplice, should not apply to cases of misdemeanor, was held not to have retrospective operation.

Whether a law which, for the purpose of excluding disloyal voters, requires of all persons voting an oath of loyalty, is *ex post facto*, see the case of *Green v.*

Shumway, 39 N. Y. 418, which holds that it is, and *Blair v. Ridgeley*, 41 Mo. 63, and *State v. Neal*, 42 Mo. 119, which hold that it is not.

An act to validate an invalid conviction of crime would be *ex post facto*. In *re Murphy*, 1 Woolw. 141.

know what money is expended, for what purposes, and by what authority.

§ 1349. A learned commentator has, however, thought that the provision, though generally excellent, is defective in not having enabled the creditors of the government, and other persons having vested claims against it, to recover, and to be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation.¹(a) Perhaps it is a defect. And yet it is by no means certain, that evils of an opposite nature might not arise if the debts, judicially ascertained to be due to an individual by a regular judgment, were to be paid, of course, out of the public treasury. It might give an opportunity for collusion and corruption in the management of suits between the claimant and the officers of the government intrusted with the performance of this duty. Undoubtedly, when a judgment has been fairly obtained, by which a debt against the government is clearly made out, it becomes the duty of Congress to provide for its payment; and generally, though certainly with a tardiness which has become in some sort a national reproach, this duty is discharged by Congress in a spirit of just liberality. But still, the known fact, that the subject must pass in review before Congress, induces a caution and integrity in making and substantiating claims, which would in a great measure be done away, if the claim were subject to no restraint and no revision.

§ 1350. The next clause is, "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."

§ 1351. This clause seems scarcely to require even a passing notice. As a perfect equality is the basis of all our institutions, state and national, the prohibition against the creation of any titles of nobility seems proper, if not indispensable, to keep perpetually alive a just sense of this important truth. Distinctions between citizens in regard to rank would soon lay the foundation of odious claims and privileges, and silently subvert the

¹ 1 Tuck. Black. Comm. App. 362 to 364.

(a) Claims against the United States and counterclaims are now adjudicated by a Court of Claims, originating from the act of Feb. 24, 1855. An appeal to the Supreme Court is given in certain cases.

spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government.¹

§ 1352. The other clause, as to the acceptance of any emoluments, title, or office, from foreign governments, is founded in a just jealousy of foreign influence of every sort. Whether, in a practical sense, it can produce much effect, has been thought doubtful. A patriot will not be likely to be seduced from his duties to his country by the acceptance of any title, or present, from a foreign power. An intriguing or corrupt agent will not be restrained from guilty machinations in the service of a foreign state by such constitutional restrictions. Still, however, the provision is highly important, as it puts it out of the power of any officer of the government to wear borrowed honors, which shall enhance his supposed importance abroad by a titular dignity at home.² It is singular, that there should not have been, for the same object, a general prohibition against any citizen whatever, whether in private or public life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by Congress; but, as yet, it has not received the ratification of the constitutional number of States to make it obligatory, probably from a growing sense that it is wholly unnecessary.³

¹ The Federalist, No. 84.

² 1 Tuck. Black. Comm. App. 295, 296; Rawle on Constitution, ch. 10, pp. 119, 120.

³ Rawle on Constitution, ch. 10, p. 120.

CHAPTER XXXIII.

PROHIBITIONS ON THE STATES.

§ 1353. THE tenth section of the first article, to which we are now to proceed, contains the prohibitions and restrictions upon the authority of the States. Some of these, and especially those which regard the power of taxation and the regulation of commerce, have already passed under consideration; and will, therefore, be here omitted. The others will be examined in the order of the text of the Constitution.

§ 1354. The first clause is, "No State shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, (a) *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."¹

§ 1355. The prohibition against treaties, alliances, and confederations, constituted a part of the articles of confederation,² and was from thence transferred in substance into the Constitution. The sound policy, nay, the necessity of it, for the preservation of any national government, is so obvious, as to strike the most careless mind. If every State were at liberty to enter into any treaties, alliances, or confederacies, with any foreign state, it would become utterly subversive of the power confided to the national government on the same subject. Engagements

¹ In the original draft of the Constitution, some of these prohibitory clauses were not inserted; and particularly the last clause, prohibiting a State to pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. The former part was inserted by a vote of seven States against three. The latter was inserted in the revised draft of the Constitution, and adopted at the close of the convention, whether with or without opposition does not appear. Journal of Convention, 277, 302, 359, 377, 379. It was probably suggested by the clause in the ordinance of 1787 (Art. 2), which declared, "that no law ought to be made, etc. that shall interfere with or affect private contracts, or engagements, *bona fide*, and without fraud, previously formed."

² Art. 6.

(a) See *Pierce v. Carskadon*, 16 Wall. 284; *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 11. 383; *ante*, pp. 218, 219.

might be entered into by different States, utterly hostile to the interests of neighboring or distant States; and thus the internal peace and harmony of the Union might be destroyed, or put in jeopardy. A foundation might thus be laid for preferences and retaliatory systems, which would render the power of taxation, and the regulation of commerce, by the national government, utterly futile. Besides, the intimate dangers to the Union ought not to be overlooked, by thus nourishing within its own bosom a perpetual source of foreign corrupt influence, which, in times of political excitement and war, might be wielded to the destruction of the independence of the country. This, indeed, was deemed, by the authors of the Federalist, too clear to require any illustration.¹ (a) The corresponding clauses in the confederation were still more strong, direct, and exact, in their language and import.

§ 1356. The prohibition to grant letters of marque and reprisal stands upon the same general ground; for otherwise it would be in the power of a single State to involve the whole Union in war at its pleasure. It is true, that the granting of letters of marque and reprisal is not always a preliminary to war, or necessarily designed to provoke it. But in its essence it is a hostile measure for unredressed grievances, real or supposed; and therefore is most generally the precursor of an appeal to arms by general hostilities. The security, as has been justly observed, of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single State.² Under the confederation there was a like prohibition in a more limited form. According to that instrument, no State could grant letters of marque and reprisal until after a declaration of war by the Congress of the United States.³ In times of peace the power was exclusively confided to the general government. The Constitution has wisely, both in peace and war, confided the whole subject to the general government. Uniformity is thus secured in all operations which relate to foreign powers; and an immediate responsibility to the nation on the part of those for whose conduct the nation is itself responsible.⁴

¹ The Federalist, No. 44.

² 1 Tuck. Black. Comm. App. 310, 311.

³ Article 6.

⁴ The Federalist, No. 44; Rawle on Constitution, ch. 10, p. 136.

(a) See note to § 1402, *post*.

§ 1357. The next prohibition is to coin money. We have already seen that the power to coin money, and regulate the value thereof, is confided to the general government. Under the confederation, a concurrent power was left in the States, with a restriction, that Congress should have the exclusive power to regulate the alloy and value of the coin struck by the States.¹ In this, as in many other cases, the Constitution has made a great improvement upon the existing system. Whilst the alloy and value depended on the general government, a right of coinage in the several States could have no other effect than to multiply expensive mints, and diversify the forms and weights of the circulating coins. The latter inconvenience would defeat one main purpose for which the power is given to the general government, viz., uniformity of the currency; and the former might be as well accomplished by local mints established by the national government, if it should ever be found inconvenient to send bullion or old coin for re-coinage to the central mint.² Such an event could scarcely occur, since the common course of commerce throughout the United States is so rapid and so free, that bullion can with a very slight expense be transported from one extremity of the Union to another. A single mint only has been established, which has hitherto been found quite adequate to all our wants. The truth is, that the prohibition had a higher motive, the danger of the circulation of base and spurious coin connived at for local purposes, or easily accomplished by the ingenuity of artificers, where the coins are very various in value and denomination, and issued from so many independent and unaccountable authorities. This subject has, however, been already enlarged on in another place.³

§ 1358. The prohibition to “emit bills of credit” cannot, perhaps, be more forcibly vindicated than by quoting the glowing language of the Federalist, a language justified by that of almost every contemporary writer, and attested in its truth by facts from which the mind involuntarily turns away at once with disgust and indignation. “This prohibition,” says the Federalist, “must give pleasure to every citizen in proportion to his love of justice, and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace from the pesti-

¹ Article 9.

² The Federalist, No. 44.

³ 1 Tuck. Black. Comm. App. 311, 312; Id. 261. *Ante*, §§ 1116-1123.

lent effects of paper-money on the necessary confidence between man and man; on the necessary confidence in the public councils; on the industry and morals of the people; and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated not otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed, that the same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to *substitute a paper medium instead of coin*. Had every State a right to regulate the value of its coin, there might be as many different currencies as States; and thus the intercourse among them would be impeded. Retrospective alterations in its value might be made; and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause; and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper-money, than to coin gold or silver.”¹

§ 1359. The evils attendant upon the issue of paper-money by the States after the peace of 1783, here spoken of, are equally applicable, and perhaps apply with even increased force to the paper issues of the States and the Union during the revolutionary war. Public, as well as private credit, was utterly prostrated.² The fortunes of many individuals were destroyed; and those of all persons were greatly impaired by the rapid and unparalleled depreciation of the paper currency during this period. In truth, the history of the paper currency, which during the revolution was issued by Congress alone, is full of melancholy instruction. It is at once humiliating to our pride, and disreputable to our national justice. Congress at an early period (November, 1775) directed an emission of bills of credit to the amount of three mil-

¹ The Federalist, No. 44; 2 Elliot's Debates, 83. See in Mr. Webster's Speeches on the Bank of the United States, in Senate, 25th and 28th of May, 1832, some cogent remarks on the same subject. See also Mr. Madison's Letter to Mr. C. J. Ingersoll, 2d of February, 1811.

² See *Sturgis v. Crowninshield*, 4 Wheat. R. 204, 205.

lions of dollars; and declared on the face of them, that "this bill entitles the bearer to receive — Spanish milled dollars, or the value thereof in gold or silver, according to a resolution of Congress, passed at Philadelphia, November 29th, 1775." And they apportioned a tax of three millions on the States, in order to pay these bills, to be raised by the States according to their quotas at future designated periods. The bills were directed to be receivable in payment of the taxes; and the thirteen colonies were pledged for their redemption.¹ Other emissions were subsequently made. The depreciation was a natural, and indeed a necessary consequence of the fact, that there was no fund to redeem them. Congress endeavored to give them additional credit by declaring, that they ought to be a tender in payment of all private and public debts; and that a refusal to receive the tender ought to be an extinguishment of the debt, and recommending the States to pass such tender laws. They went even further, and thought proper to declare, that whoever should refuse to receive this paper in exchange for any property, *as gold and silver, should be deemed "an enemy to the liberties of these United States."*² This course of violence and terror, so far from aiding the circulation of the paper, led on to still further depreciation. New issues continued to be made, until, in September, 1779, the whole emission exceeded one hundred and sixty millions of dollars. At this time Congress thought it necessary to declare, that the issues on no account should exceed two hundred millions; and still held out to the public the delusive hope of an ultimate redemption of the whole at par. They indignantly repelled the idea, in a circular address, that there could be any violation of the public faith, pledged for their redemption; or that there did not exist ample funds to redeem them. They indulged in still more extraordinary delusions, and ventured to recommend paper-money, as of peculiar value. "Let it be remembered," said they, "that paper-money is the only kind of money which cannot make to itself wings and fly away."³

§ 1360. The States still continued to fail in complying with

¹ 1 Journal of Congress, 1775, pp. 186, 280, 304.

² 2 Journal of Congress, 11th January, 1776, p. 21; 14th January, 1777; 3 Journal of Congress, pp. 19, 20; 2 Pitk. Hist. ch. 16, pp. 155, 156.

³ See 4 Journal of Congress, 9th Dec. 1778, p. 742, and 5 Journal of Congress, 13th Sept. 1779, pp. 341 to 353; 2 Pitk. Hist. ch. 16, pp. 156, 157.

the requisitions of Congress to pay taxes; and Congress, notwithstanding their solemn declaration to the contrary, increased the issue of paper-money, until it amounted to the enormous sum of upwards of three hundred millions.¹ The idea was then abandoned of any redemption at par. In March, 1780, the States were required to bring in the bills at *forty for one*; and new bills were then to be issued in lieu of them, bearing an interest of five per cent, redeemable in six years, to be issued on the credit of the individual States, and guaranteed by the United States.² This new scheme of finance was equally unavailing. Few of the old bills were brought in, and, of course, few of the new were issued. At last the continental bills became of so little value, that they ceased to circulate; and, in the course of the year 1780, they quietly died in the hands of their possessors.³ Thus were redeemed the solemn pledges of the national government!⁴ Thus was a paper currency, which was declared to be equal to gold and silver, suffered to perish in the hands of persons compelled to take it; and the very enormity of the wrong made the ground of an abandonment of every attempt to redress it!

§ 1361. Without doubt, the melancholy shades of this picture were deepened by the urgent distresses of the revolutionary war, and the reluctance of the States to perform their proper duty.

¹ In the American Almanac, for 1830, p. 183, the aggregate amount is given at \$357,000,000 of the old emission, and \$2,000,000 of the new emission; upon which, the writer adds, "there was an average depreciation of two-thirds of its original value." Mr. Jefferson has given an interesting account of the history of paper-money during the revolution, in an article written for the *Encyclopédie Méthodique*. 1 Jefferson's Corresp. 398, 401, 411, 412.

² 6 Journal of Convention, 18th March, 1780, pp. 45 to 48.

³ 2 Pitkin's Hist. ch. 16, pp. 156, 157; 1 Jefferson's Corresp. 401, 402, 411, 412.

⁴ The twelfth article of the confederation declares, "that all bills of credit emitted, etc. by or under the authority of Congress, etc. shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged." When was this pledge redeemed? The act of Congress of 1790, ch. 61, for the liquidation of the public debt, directs bills of credit to be estimated at the rate of one hundred dollars for one dollar in specie. In Mr. Secretary Hamilton's Report on the Public Debt and Credit, in January, 1790, the unliquidated part of the public debt, consisting chiefly of continental bills of credit, was estimated at two millions of dollars. What was the nominal amount of the bills of credit, which this sum of two millions was designed to cover at its specie value, does not appear in the report. But in the debates in Congress, upon the bill founded on it, it was asserted, that it was calculated that there were seventy-eight or eighty millions of paper-money then outstanding, valued at a depreciation of forty for one. 3 Lloyd's Deb. 282, 283, 288.

And some apology, if not some justification of the proceedings, may be found in the eventful transactions and sufferings of those times. But the history of paper-money, without any adequate funds pledged to redeem it, and resting merely upon the pledge of the public faith, has been in all ages and in all nations the same. It has constantly become more and more depreciated; and in some instances has ceased, from this cause, to have any circulation whatsoever, whether issued by the irresistible edict of a despot, or by the more alluring order of a republican Congress. There is an abundance of illustrative facts scattered over the history of those of the American colonies which ventured upon this pernicious scheme of raising money to supply the public wants during their subjection to the British crown, and in the several States, from the declaration of independence down to the present times. Even the United States, with almost inexhaustible resources, and with a population of 9,000,000 of inhabitants, exhibited during the late war with Great Britain the humiliating spectacle of treasury notes, issued and payable in a year, remaining unredeemed, and sunk by depreciation to about half of their nominal value!

§ 1362. It has been stated, by a very intelligent historian, that the first case of any issue of bills of credit, in any of the American colonies, as a substitute for money, was by Massachusetts, to pay the soldiers who returned unexpectedly from an unsuccessful expedition against Canada, in 1690. The debt thus due to the soldiers was paid by paper notes, from two shillings to ten pounds denomination, which notes were to be received for payment of the tax which was to be levied, and all other payments into the treasury.¹ It is added, that they had better credit than King James's leather money in Ireland about the same time. But the notes could not command money, nor any commodities at money price.² Being of small amount, they were soon absorbed in the discharge of taxes. At subsequent periods the government resorted to similar expedients. In 1714, there being a cry of a scarcity of money, the government caused £50,000 to be issued in bills of credit; and in 1716, £100,000 to be lent to the inhabitants for a limited period, upon lands mortgaged by them as security, and, in the mean time, to pass as money.³ These bills

¹ 1 Hutch. Hist. ch. 3, p. 402.

² Ibid.

³ 1 Hutch. Hist. ch. 3, p. 403, note; 2 Hutch. Hist. 208, 245, and note; Id. 380, 381, 403, 404.

were receivable into the treasury in discharge of taxes, and also of the mortgage debts so contracted. Other bills were afterwards issued; and indeed we are informed, that, for about forty years, the currency of the province was in much the same state as if £100,000 sterling had been stamped on pieces of leather or paper, of various denominations, and declared to be the money of the government, receivable in payment of taxes, and in discharge of private debts.¹ The consequence was a very great depreciation; so that an ounce of silver, which, in 1702, was worth six shillings and eight pence, was, in 1749, equal to fifty shillings of this paper currency.² It seems that all the other colonies, except Nova Scotia, at different times and for various purposes authorized the issue of paper-money.³ There was a uniform tendency to depreciation wherever it was persisted in.⁴ (a)

§ 1363. It would seem to be obvious that, as the States are expressly prohibited from coining money, the prohibition would be wholly ineffectual if they might create a paper currency and circulate it as money. But, as it might become necessary for the States to borrow money, the prohibition could not be intended to prevent such an exercise of power, on giving to the lender a certificate of the amount borrowed, and a promise to repay it.

§ 1364. What, then, is the true meaning of the phrase "bills

¹ 1 Hutch. Hist. ch. 3, pp. 402, 403, and note, id.

² Ibid. Hutchinson says, that, in 1747, the currency had sunk to sixty shillings for an ounce of silver. 2 Hutch. Hist. 438.

³ 1 Hutch. Hist. ch. 3, pp. 402, 403, and note, id.

⁴ 4 Peters's Sup. Ct. R. 435.

(a) See *Briscoe v. Commonwealth Bank*, 8 Peters, 118. Mr. William F. Gray, of New York, in a pamphlet published on the constitutionality of a Bank of the United States (New York, 1841), has shown that the phrase "bills of credit" was familiarly used, as equivalent to bank-notes, as early as 1683 in England. An example of a transaction in such paper between the Province of Massachusetts Bay and a citizen of the Province, Joshua Bigelow, may be added. On February 14, 1714, Joshua Bigelow and wife mortgage lands in Weston, Massachusetts, to Commissioners of the Province, in trust for the Province, to secure a loan of £50, "in good and lawful Bills of Public Credit of the Province," the loan to be paid in five years, with annual interest at 5 per cent. The transaction shows how paper-money was at that time put into circulation. Middlesex Reg. of Deeds, book 17, p. 200. Earlier still, on July 18, 1712, the consideration of a deed by Isaac Jones to the same Joshua Bigelow is recited to be £85 "current money of New England or Bills of Credit." As the author states, the issue of such currency was authorized in Massachusetts as early as 1690; and it began only two or three years later. See note to § 1367. And further see Weeden's *Economic and Social Hist. of New England*, vol. 2, pp. 474-476 (ch. 13).

of credit," in the Constitution? (a) In its enlarged, and perhaps in its literal sense, it may comprehend any instrument by which a State engages to pay money at a future day (and, of course, for which it obtains a present credit); and thus it would include a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day, for services actually received, or for money borrowed for present use. Nor are instruments, executed for such purposes, in common language denominated "bills of credit." To emit bills of credit conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms of the Constitution have been generally understood.¹ The phrase, as we have seen, was well known, and generally used to indicate the paper currency issued by the States during their colonial dependence. During the war of our revolution, the paper currency issued by Congress was constantly denominated, in the acts of that body, bills of credit; and the like appellation was applied to similar currency issued by the States. The phrase had thus acquired a determinate and appropriate meaning. At the time of the adoption of the Constitution, bills of credit were universally understood to signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has always been liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense losses, are the sources of ruinous speculations, and destroy all proper confidence between man and man.² In no country, more than our own, had these truths been felt in all their force. In none had more intense suffering or more wide-spreading ruin accompanied the system. It was, therefore, the object of the prohibition to cut up the whole mischief by the roots, because it had been deeply felt throughout all the States, and had deeply

¹ *Craig v. State of Missouri*, 4 Peters's Sup. Ct. R. 410, 432.

² *Id.* 432, 441, 442.

(a) See *Poindexter v. Greenhow*, 114 U. S. 270; 1 Hare Am. Const. Law, 267 *et seq.*

affected the prosperity of all. The object of the prohibition was not to prohibit the thing when it bore a particular name; but to prohibit the thing, whatever form or name it might assume. If the words are not merely empty sounds, the prohibition must comprehend the emission of any paper medium, by a State government, for the purposes of common circulation.¹ It would be preposterous to suppose that the Constitution meant solemnly to prohibit an issue under one denomination, leaving the power complete to issue the same thing under another. It can never be seriously contended, that the Constitution means to prohibit names, and not things; to deal with shadows, and to leave substances. What would be the consequence of such a construction? That a very important act, big with great and ruinous mischief, and, on that account, forbidden by words the most appropriate for its description, might yet be performed by the substitution of a name. That the Constitution, even in one of its vital provisions, might be openly evaded, by giving a new name to an old thing. Call the thing a bill of credit, and it is prohibited. Call the same thing a certificate, and it is constitutional.²

§ 1365. But it has been contended recently, that a bill of credit, in the sense of the Constitution, must be such a one as is, by the law of the State, made a legal tender. But the Constitution itself furnishes no countenance to this distinction. The prohibition is general; it extends to all bills of credit, not to bills of a particular description. And surely no one in such a case is at liberty to interpose a restriction which the words neither require nor justify. Such a construction is the less admissible, because there is in the same clause an express and substantive prohibition of the enactment of tender laws. If, therefore, the construction were admissible, the Constitution would be chargeable with the folly of providing against the emission of bills of credit, which could not, in consequence of another prohibition, have any legal existence. The Constitution considers the emis-

¹ *Craig v. State of Missouri*, 4 Peters's Sup. Ct. R. 432, 441, 442.

² *Id.* 432, 433, 441, 442, 443. An act of Parliament was passed (24 Geo. II., ch. 53), regulating and restraining the issues of paper-money and bills of credit in the New England colonies, in which the language used demonstrates that "bills of credit" was a phrase constantly used and understood as equivalent to paper-money. The prohibitory clauses forbid the issue of "any paper bills, or bills of credit of any kind or denomination whatsoever," &c., and constantly speak of "paper bills, or bills of credit," as equivalents. See *Deering v. Parker*, 4 Dall. (July, 1760) p. xxiii.

sion of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be frequently performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they are not made a tender in payment of debts, is, in effect, to expunge that distinct, independent prohibition, and to read the clause as if it had been entirely omitted.¹ (a) No principle of interpretation can justify such a course.

§ 1366. The history of paper-money in the American colonies and States is often referred to for the purpose of showing, that one of its great mischiefs was its being made a legal tender in the discharge of debts; and hence the conclusion is attempted to be adduced that the words of the Constitution may be restrained to this particular intent. But, if it were true that the evils of paper-money resulted solely from its being made a tender, it would be wholly unjustifiable on this account to narrow down the words of the Constitution, upon a mere conjecture of intent not derivable from those words. A particular evil may have induced a legislature to enact a law; but no one would imagine, that its language, if general, ought to be confined to that single case. The leading motive for a constitutional provision may have been a particular mischief; but it may yet have been intended to cut

¹ *Craig v. State of Missouri*, 4 Peters's Sup. Ct. R. 433, 434.

(a) To constitute a bill of credit within the meaning of the Constitution, the paper must be issued by a State, involve the faith of the State, and be designed to circulate as money on the credit of the State in the ordinary uses of business. *Briscoe v. Bank of Kentucky*, 11 Pet. 257. Bills issued by a banking corporation which has a capital paid in, and may be sued upon its debts, are not to be deemed bills of credit, even though the State owns the entire stock, the legislature elect the directors, the faith of the State is pledged for the redemption of the bills, and they are made receivable for all public dues. In a bill of credit the promise to pay is that of the State. *Darrington v. State Bank*, 13 How. 12; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Curran v. Arkansas*, 15 How. 317. And see *Woodruff*

v. Trapnall, 10 How. 205; *Bailey v. Milner*, 35 Ga. 330; *City National Bank v. Mahan*, 21 La. An. 751. Further, see 1 Hare, *Am. Const. Law*, 267 *et seq.*: "The constitutional prohibition was thus evaded, and Congress deprived of the control over the currency which the framers of the Constitution had intended to confer. Hamilton's sagacious mind anticipated and sought to guard against the danger by creating a national bank." Mr. Justice Story, dissenting in *Briscoe v. Bank of Kentucky*, *supra*, argued, as in the text, that whether paper-money was issued by a State, or by a corporation created by it for that end, the thing in substance was the same. But inveterate practice prevailed in the face of the language of the Constitution.

down all others of a like nature, leading more or less directly to the same general injury to the country. That the making of bills of credit a tender was the most pernicious of their characteristics, will not authorize us to convert a general prohibition into a particular one.¹

§ 1367. But the argument itself is not borne out by the facts. The history of our country does not prove that it was an essential quality of bills of credit that they should be a tender in payment of debts; or that this was the only mischief resulting from them. (a) Bills of credit were often issued by the colonies, and

¹ *Craig v. State of Missouri*, 4 Peters's Sup. Ct. R. 433, 434.

(a) In a dissenting opinion delivered by Mr. Justice Story, in the case of *Briscoe v. Bank of the Commonwealth*, he gives the following historic review of bills of credit, existing in the colonies and provinces in America anterior to the revolution :—

“The history of our country proves that it is not of the essence of bills of credit, it is not a part of their definition, that they should be a tender in payment of debts. Many instances, in proof of this, were given in the opinion so often alluded to. Not a single historian upon this subject alludes to any such ingredient, as essential or indispensable.

“It has been said, and it has never been denied, that the very first issue of bills of credit by any of the colonies was by the province of Massachusetts, in 1690. The form of these bills was : ‘This indented bill of ten shillings, due from the Massachusetts colony to the possessor, shall be in value equal to money, and shall be accordingly accepted by the treasurer, and receivers subordinate to him, in all public payments, and for any stock at any time in the treasury.’ Then followed the date and the signatures of the committee authorized to emit them. They were not made a tender in payment of debts, except of those due to the State. In 1702, 3 Anne, ch. 1, another emission of bills of credit, for fifteen thousand pounds, was authorized in the same form ; but they were not made a tender by the

act ; and the then duties of impost and excise were directed to be applied to the discharge of those bills, as also a tax of ten thousand pounds on polls and estates, real and personal, to be levied and collected, and paid into the treasury in 1705. A subsequent act, passed in 1712, made them a tender in payment of private debts. In 1716, act of 3 Geo. I. ch. 6, a further emission of one hundred and fifty thousand pounds, in ‘bills of credit,’ was expressly authorized to be made in the like form ; to be distributed among the different counties of the province, in a certain proportion stated in the act ; and to be put into the hands of five trustees in each county, to be appointed by the legislature, to be let out by the trustees on reasonable security in the county, in certain specified sums, for the space of ten years, at five per cent per annum. The mortgages were to be made to the trustees, and to be sued for by them ; and the profits were to be applied to the general support of the government. These bills were not made a tender. Now, this act is most important to show that the fact, that the bills of credit were to be let out on mortgage, was not deemed in the slightest degree material to the essence of such bills. An act for the emission of bills of credit, not materially different in the substance of its provisions, had been passed in 1714, 1 Geo. I. ch. 2. Another act, for the emission of fifty thousand pounds in bills of credit, was passed in

by several States afterwards, which were not made a legal tender; but were made current, and simply receivable in discharge of

1720, 7 Geo. I. ch. 9, containing provisions nearly similar; except that the trustees were to be appointed by the towns, and the profits were to be received by the towns, and a tax of fifty thousand pounds on polls and estates was authorized to be raised to redeem the same. In 1720, the colony of Rhode Island issued bills of credit, nearly in the form of the Massachusetts bills; and they were made a tender in payment of all debts, excepting special ones; and similar bills were issued in 1710 and 1711. In 1715, another issue was authorized to be let out by trustees and committees of towns on mortgage, for ten years. There is no clause in the act declaring them a tender. The same year another emission was authorized.

"In 1709, the colony of Connecticut authorized an emission of bills of credit, in a similar form; appropriating a tax for their redemption. There was no clause making them a tender. Numerous other acts, of the like nature, were passed between that period and 1731; some of which made them a tender, and others not.

"In 1709, the colony of New York issued bills of credit, in a form substantially the same; and they were made a tender in the payment of debts, and these bills were to bear interest. Many other emissions of bills of credit were from time to time authorized to be made in similar forms; they were generally made a tender, and, generally, funds were provided for their due redemption.

"In 1722, the province of Pennsylvania issued bills of credit, in a form not substantially different from those of the New England States; which were delivered to trustees, to be loaned on mortgages, on land or ground rents; and they were made a tender in payment of all debts. Other emissions, for like purposes, were authorized by subsequent laws. In the year 1739, an emission of

bills of credit was authorized by the State of Delaware, for similar purposes, and in a similar form, to be loaned on mortgages. They were made a tender in payment of debts, and a sinking fund was provided.

"In 1733, Maryland authorized an emission of bills of credit, to the amount of ninety thousand pounds, to be issued by and under the management of three commissioners, or trustees, who were incorporated by the name of 'The Commissioners or Trustees, for emitting Bills of Credit;' and by that name might sue and be sued, and sell all real and personal estate granted them in mortgage, &c. These bills of credit, with certain exceptions, were to be lent out on interest, by the commissioners, or trustees, at four per cent, upon mortgage or personal security; and a sinking fund was provided for their redemption, &c., and they were made a tender in payment of debts. Another emission was authorized in 1769; and two commissioners were appointed to emit the bills, to be called 'Commissioners for emitting Bills of Credit;' and by that name to have succession, and to sue and be sued. These bills, also, were to be let out by the commissioners on security, and a fund was provided for their redemption. These bills were not made a tender.

"In Virginia, bills of credit were issued as early as 1755, under the name of treasury notes, which bore interest, and were made a tender in payment of debts. Emissions were subsequently made at other periods, and especially in 1769, 1771, and 1773. These three last were not made a tender. In 1778, another emission of them was authorized, which were made a tender; and a fund was pledged for their redemption. Many other issues were subsequently made, which were a tender. What demonstrates that these treasury notes were deemed bills of credit, is the fact, that by an act passed in 1777, ch. 34, it was made penal

taxes and other dues to the public. (a) None of the bills of credit issued by Congress during the whole period of the revo-

for any person to 'issue or offer in payment any bill of credit, or note, for any sum of money payable to the bearer;' and that the act of 1779, ch. 24, makes it a felony for any person to steal any bill of credit, treasury note, or 'loan-office certificate of the United States, or any of them;' and that the act of 1780, ch. 19, after reciting that the exigencies of the war requires the emission of paper-money, &c., authorizes the emission of new treasury notes, and proceeds to punish with death any person who shall forge 'any bill of credit, or treasury note, to be issued by virtue of this act.' In 1748, North Carolina authorized the emission of bills of credit, which were made a tender, and a fund was provided for their redemption; and many subsequent emissions were authorized, with similar provisions.

"In 1703, South Carolina first issued bills of credit. They were to bear an interest of twelve per cent. Funds were provided for their redemption. They do not seem originally to have been made a tender. Many other acts, for the emission of bills of credit, were from time to time passed by the colony; some, if not all, of which were made a tender. One of these acts, passed in 1712, was of a peculiar nature; but, as I have not been

able to procure a copy of it, I can only refer to it as it is stated by Hewitt, 1 Hewitt, Hist. of S. Car. 204, who says: 'At this time the legislature thought proper to establish a public bank, and issued forty-eight thousand pounds in bills of credit, called bank-bills, for answering the exigencies of government, and for the convenience of domestic commerce. This money was to be lent out at interest, on landed or personal security; and, according to the tenor of the act for issuing the same, it was to be sunk gradually, by four thousand pounds a year, which sum was ordered to be paid annually by the borrowers into the hands of the commissioners appointed for that purpose.' In 1760, Georgia authorized an emission of bills of credit, to be let out at interest, and mortgages were to be taken by the commissioners. These bills were made a tender. Subsequent acts, for issuing bills of credit, were passed; but it is not necessary to recite them.

"Congress, during the revolutionary war, issued more than three hundred millions of bills of credit. The first issue was in 1775, and the confederated colonies were pledged for their redemption. None of the bills of credit issued by Congress were made a tender; probably from the doubt whether Congress possessed the

(a) The bills of credit issued by Massachusetts in 1690 (the first ever issued in any colony) were in the following form: "No. —, 10s. This indented bill of ten shillings, due from the Massachusetts colony to the possessor, shall be in value equal to money, and shall be accordingly accepted by the treasurer, and receivers subordinate to him, in all public payments, and for any stock at any time in the treasury. Boston, in New England, Dec. the 10th, 1690. By order of the General Court: Peter Townsend, Adam Winthrop, Tim Thornton, Com-

mittee." So that it was not, in any sense, a tender, except in discharge of public debts. 3 Mass. Hist. Collections (2d series), pp. 260, 261. The bills of credit of Connecticut, passed before the revolution, were of the same general character and operation. They were not made a tender in payment of private debts. The emission of them was begun in 1709, and continued, at least, for nearly a half century. The acts authorizing the emission generally contained a clause for raising a tax to redeem them.

lution, were made a legal tender; and indeed it is questionable if that body possessed the constitutional authority to make them such. At all events they never did attempt it; but recommended, as has been seen, that the State should make them a tender.¹ The act of Parliament of 24 Geo. II., ch. 53, is equally strong on this point. It prohibited any of the New England colonies from issuing any new paper bills, or "bills of credit," except upon the emergencies pointed out in the act; and required those colonies to call in and redeem all the outstanding bills. It then proceeded to declare, that after September, 1761, no "paper currency or bills of credit," issued or created in any of those colonies, should be a legal tender, with a proviso, that nothing therein contained should be construed to extend to make any of the bills then subsisting a legal tender.

§ 1368. Another suggestion has been made: that paper currency, which has a fund assigned for its redemption by the State

¹ Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 434, 435, 436, 442, 443.

power to make them a tender. The form of those first issued was as follows: 'This bill entitles the bearer to receive Spanish milled dollars, or the value thereof, in gold and silver, according to the resolutions of Congress.' The last emission was made in 1780, under the guarantee of Congress, and was in the following form: 'The possessor of this bill shall be paid Spanish milled dollars, by the 31st of December, 1786, with interest, in like money, at the rate of five per cent per annum, by the State of _____, according to an act of the legislature of the State of _____, the day of _____, 1780.' The indorsement by Congress was: 'The United States insure the payment of the within bill, and will draw bills of exchange annually, if demanded, according to a resolve of Congress of the 18th of March, 1780.' These bills were expressly required by Congress to issue on the funds of the individual States, established for that purpose; and the faith of the United States was pledged for their payment. They were made receivable in all public payments.

"I will close this unavoidably prolix,

though, in my judgment, very important review of the history of bills of credit in the colonies, and during the revolution, with a reference to the act of 24th of Geo. II. ch. 53, 1751, for regulating and restraining the issues of paper-money in New England. That act, in its prohibitory clause, expressly forbids the issue of 'any paper bills or bills of credit, of any kind or denomination whatsoever,' except for certain purposes, and upon certain specified emergencies; and constantly speaks of 'paper bills or bills of credit,' as equivalent expressions; thus demonstrating that the true meaning of bills of credit was paper emitted by the State, and intended to pass as currency; or in other words, as paper-money. It further requires, that the acts authorizing such issues of 'paper bills or bills of credit,' shall provide funds for the payment thereof; and make provisions for cases where such 'paper bills or bills of credit,' had been loaned out on security, and declares that 'no paper currency or bills of credit,' issued under the act, shall be a legal tender in payment of any private debts or contracts whatsoever."

which authorizes its issue, does not constitutionally fall within the description of "bills of credit." The latter words, it is said, appropriately import bills drawn on *credit merely*, and not bottomed upon any real or substantial fund for their redemption; and there is a material and well-known distinction between a bill drawn upon a fund, and one drawn upon credit only.¹ In confirmation of this reasoning, it has been said, that the emissions of paper-money by the States, previous to the adoption of the Constitution, were, properly speaking, bills of credit, not being bottomed upon any fund constituted for their redemption, but resting solely, for that purpose, upon the credit of the State issuing the same. But this argument has been deemed unsatisfactory in its own nature, and not sustained by historical facts. All bills issued by a State, whether special funds are assigned for the redemption of them or not, are, in fact, issued on the credit of the State. If these funds should from any cause fail, the bills would be still payable by the State. If these funds should be applied to other purposes (as they may be by the State), or withdrawn from the reach of the creditor, the State is not less liable for their payment. No exclusive credit is given, in any such case, to the fund. If a bill or check is drawn on a fund by a private person, it is drawn also on his credit, and if the bill is refused payment out of the fund, the drawer is still personally responsible. Congress has, under the Constitution, power to borrow money on the credit of the United States. But it would not be less borrowing on that credit, that funds should be pledged for the repayment of the loan; such, for instance, as the revenue from duties, or the proceeds of the public lands. If these funds should fail, or be diverted, the lender would still trust to the credit of the government. But, in point of fact, the bills of credit, issued by the colonies and States, were sometimes with a direct or implied pledge of funds for their redemption. The Constitution itself points out no distinction between bills of the one sort or the other. And the act of 24 Geo. II., ch. 53, requires, that when bills of credit are issued by the colonies in the emergencies therein stated, an ample and sufficient fund shall, by the acts authorizing the issue, be established for the discharge of the same within five years at the furthest. So that there is positive evidence that the phrase, "bills of credit," was under-

¹ Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 447.

stood in the colonies to apply to all paper-money, whether funds were provided for the repayment or not.¹

§ 1369. This subject underwent an ample discussion in a late case. The State of Missouri, with a view to relieve the supposed necessities of the times, authorized the establishment of certain loan-offices to loan certain sums to the citizens of that State, for which the borrowers were to give security by mortgage of real estate, or personal property, redeemable in a limited period by instalments. The loans were to be made in certificates, issued by the auditor and treasurer of the State, of various denominations, between ten dollars and fifty cents, all of which, on their face, purported to be receivable at the treasury, or any of the loan-offices of the State, in the discharge of taxes or debts due to the State for the sum of —, with interest for the same at two per centum per annum. These certificates were also made receivable in payment of all salt at the salt springs; and by all public officers, civil and military, in discharge of their salaries and fees of office. And it was declared, that the proceeds of the salt springs, the interest accruing to the State, and all estates purchased under the same act, and all debts due to the State, should be constituted a fund for the redemption of them. The question made was, whether they were "bills of credit" within the meaning of the Constitution. It was contended, that they were not; they were not made a legal tender, nor directed to pass as money or currency. They were mere evidences of loans made to the State, for the payment of which specific and available funds were pledged. They were merely made receivable in payment of taxes or other debts due to the State.

§ 1370. The majority of the Supreme Court were of opinion, that these certificates were bills of credit within the meaning of the Constitution. Though not called bills of credit, they were so in fact. They were designed to circulate as currency, the certificates being to be issued in various denominations, not exceeding ten dollars, nor less than fifty cents. Under such circumstances, it was impossible to doubt their real character and object, as a paper currency. They were to be emitted by the government; and they were to be gradually withdrawn from circulation by an annual withdrawal of ten per cent. It was wholly unneces-

¹ See 2 Hutch. Hist. 208, 381.

sary that they should be declared to be a legal tender. Indeed, so far as regarded the fees and salaries of public officers, they were so.¹ The minority were of a different opinion, upon various grounds. One was, that they were properly to be deemed a loan by the State, and not designed to be a circulating currency, and not declared to be so by the act. Another was, that they bore on their face an interest, and for that reason varied in value every moment of their existence, which disqualified them for the uses and purposes of a circulating medium. Another was, that all the bills of credit of the revolution contained a promise to pay, which these certificates did not, but were merely redeemable in discharge of taxes, &c. Another was, that they were not issued upon the mere credit of the State; but funds were pledged for their redemption. Another was, that they were not to be declared a legal tender. Another was, that their circulation was not enforced by statutory provisions. No creditor was under any obligation to receive them. In their nature and character, they were not calculated to produce any of the evils which the paper-money issued in the revolution did, and which the Constitution intended to guard against.²

§ 1371. The next prohibition is, that no State shall "make anything but gold and silver coin a tender in payment of debts." This clause was manifestly founded in the same general policy which procured the adoption of the preceding clause. The history, indeed, of the various laws which were passed by the States in their colonial and independent character upon this subject,

¹ *Craig v. The State of Missouri*, 4 Peters's Sup. Ct. R. 410, 425 to 438.

² Some of these grounds apply equally to some of the "bills of credit" issued by the colonies. In fact, these certificates seem to have differed in few, if any, essential circumstances from those issued by the province of Massachusetts in 1714 and 1716, and had the same general objects in view by the same means, viz. to make temporary loans to the inhabitants to relieve their wants by an issue of paper-money. 1 Hutch. History, 402, 403, and note; 2 Hutch. History, 208. The bills of credit issued by Congress in 1780 were payable with interest. So were the treasury notes issued by Congress in the late war with Great Britain. Yet both circulated and were designed to circulate as currency. The bills of credit issued by Congress in the revolution were not made a legal tender. *Ante*, § 1367. It has been already seen, that the first bills of credit ever issued in America, in 1690, contained no promise of payment by the State, and were simply receivable in discharge of public dues. 3 Mass. Hist. Collection (2d series), 260, 261; *ante*, §§ 1359, 1367. See 4 Mass. Hist. Col. (2d series), 99. Mr. Jefferson, in the first volume of his correspondence (pp. 401, 402), has given a succinct history of paper-money in America, especially in the revolution. It is a sad but instructive account.

is startling at once to our morals, to our patriotism, and to our sense of justice. Not only was paper-money issued, and declared to be a tender in payment of debts; but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts; and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value.¹ Such grievances and oppressions, and others of a like nature, were the ordinary results of legislation during the revolutionary war and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the country; and introduced a system of fraud, chicanery, and profligacy, which destroyed all private confidence, and all industry and enterprise.² (a)

§ 1372. It is manifest, that all these prohibitory clauses, as to coining money, emitting bills of credit, and tendering anything but gold and silver in payment of debts, are founded upon the same general policy, and result from the same general considerations. The policy is, to provide a fixed and uniform value throughout the United States, by which commercial and other dealings of the citizens, as well as the moneyed transactions of the government, might be regulated. For it may well be asked, why vest in Congress the power to establish a uniform standard of value, if the States might use the same means, and thus defeat the uniformity of the standard, and consequently the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State ten-

¹ 3 Elliot's Debates, 144.

² See *Sturgis v. Crowninshield*, 4 Wheat. R. 204. *Barron v. The Mayor, &c.*, of Baltimore, 7 Peters, S. C. R. 249, per Ch. J. Marshall.

(a) See Legal Tender Cases (*Juillard v. Greenman*), 110 U. S. 421, in dissenting opinion of Field, J.

der laws? All these prohibitions are, therefore, entirely homogeneous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts. For this reason, as well as others derived from the phraseology employed, the prohibition of State tender laws will admit of no construction confining it to State laws which have a retrospective operation.¹ Accordingly, it has been uniformly held, that the prohibition applies to all future laws on the subject of tender; and, therefore, no State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin.²

§ 1373. The next prohibition is, that no State shall "pass any bill" of attainder, (a) *ex post facto* law, (b) or law impairing the obligation of "contracts." The two former require no commentary beyond what has been already offered under a similar prohibitory clause applied to the government of the United States. The same policy and principles apply to each.³ It would have been utterly useless, if not absurd, to deny a power to the Union, which might at the same time be applied by the States to purposes equally mischievous and tyrannical; and which might, when applied by the States, be for the very purpose of subverting the Union. Before the Constitution of the United States was adopted, every State, unless prohibited by its own constitution, might pass a bill of attainder, or *ex post facto* law, as a general result of its sovereign legislative power. And such a prohibition would not be implied from a constitutional provision, that the legislative, executive, and judiciary departments shall be separate and distinct; that crimes shall be tried in the county where they are committed; or that the trial by jury shall remain inviolate. The power to pass such laws would still remain, at least so far as respects crimes committed without the State.⁴ During

¹ *Ogden v. Saunders*, 12 Wheat. R. 265, per Washington, J.

² *Ogden v. Saunders*, 12 Wheat. R. 265, 269, 288, 289, 305, 306, 328, 335, 336, 339.

³ See *The Federalist*, Nos. 44, 84.

⁴ *Cooper v. Telfair*, 4 Dall. R. 14.

(a) *Pierce v. Carskadon*, 16 Wall. 234 ; 160. This provision applies of course as well to State constitutions as to statutes. *Cummings v. Missouri*, 4 Wall. 277 ; *Ex parte Garland*, Id. 373. *Kring v. Missouri*, 107 U. S. 221.

(b) See *Ex parte Medley*, 134 U. S.

the revolutionary war, bills of attainder, and *ex post facto* acts of confiscation, were passed to a wide extent; and the evils resulting therefrom were supposed, in times of more cool reflection, to have far outweighed any imagined good. (a)

(a) See *Cummings v. Missouri*, 4 Wall. 277 ; note to § 1844, *ante*.

CHAPTER XXXIV.

PROHIBITIONS ON THE STATES — IMPAIRING CONTRACTS.

§ 1374. THE remaining clause, as to impairing the obligation of contracts, will require a more full and deliberate examination. The Federalist treats this subject in the following brief and general manner. "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of their fundamental character. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights, &c. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen, with regret and indignation, that sudden changes and legislative interferences (a) in cases affecting personal rights became jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link in a long chain of repetitions, every subsequent interference being naturally provoked by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." ¹ (b)

¹ The Federalist, No. 44.

(a) As to legislation of the Confederate States, see *Dewing v. Perdicaries*, 96 U. S. 193; *Williams v. Bruffy*, Id. 176; *Wilmington R. Co. v. King*, 91 U. S. 3; *Delmas v. Merchants' Ins. Co.*, 14 Wall. 661.

(b) As to the consequences of treating a contract invalid under the Constitution, see *Louisiana v. Pilsbury*, 105 U. S. 278.

§ 1375. With these remarks the subject is dismissed. And yet, perhaps, there is not a single clause of the Constitution which has given rise to more acute and vehement controversy; and the nature and extent of whose prohibitory force has called forth more ingenious speculation, and more animated juridical discussion.¹ What is a contract? What is the obligation of a contract? What is impairing a contract? To what classes of laws does the prohibition apply? To what extent does it reach so as to control prospective legislation on the subject of contracts? These and many other questions, of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation.

§ 1376. In the first place, what is to be deemed a contract in the constitutional sense of this clause? (a) A contract is an agreement to do, or not to do, a particular thing;² or, as was said on another occasion, a contract is a compact between two or more persons.³ A contract is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. An executed contract is one in which the object of the contract is performed. This differs in

¹ 1 Kent's Comm. Lect. 19, p. 387.

² *Sturgis v. Crowninshield*, 4 Wheat. R. 197. See also *Green v. Biddle*, 8 Wheat. R. 92; *Ogden v. Saunders*, 12 Wheat. R. 256, 297, 302, 316, 335; *Gordon v. Prince*, 3 Wash. Cir. Ct. R. 319.

³ *Fletcher v. Peck*, 6 Cranch, 136.

(a) Marriage is not a contract within the meaning of this provision. *Maynard v. Hill*, 125 U. S. 190; *Hunt v. Hunt*, 24 L. C. Pub. Co. 1109; *Randall v. Kruger*, 23 Wall. 137. Nor is a judgment in tort, to pay damages. *Louisiana v. New Orleans*, 109 U. S. 285. Nor is a State constitution. *Church v. Kelsey*, 121 U. S. 282. But a provision in a State constitution may impair contracts. *Fisk v. Jefferson Police Jury*, 116 U. S. 181; *White v. Hart*, 13 Wall. 646; *Delmas v. Merchants' Ins. Co.*, 14 Wall. 661. Further as to "contracts," see *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *New Orleans Gas Co. v. Louisiana Heat Co.*, Id. 650; *New Orleans Waterworks Co. v.*

Rivers, Id. 674; *Hagood v. Southern*, 117 U. S. 52 (tax certificates); *McGahey v. Virginia*, 135 U. S. 662 (tax coupons), reviewing cases of the kind, among them *Royall v. Virginia*, 116 U. S. 572; *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 U. S. 769; *Poindexter v. Greenhow*, 114 U. S. 270; *Newton v. Mahoning*, 100 U. S. 548 (statute fixing county seat, afterwards repealed); *Union Railway Co. v. Philadelphia*, 101 U. S. 528; *Farrington v. Tennessee*, 95 U. S. 679; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Humphrey v. Pegues*, 16 Wall. 244; *Wilmington R. Co. v. Reid*, 13 Wall. 264; *Raleigh R. Co. v. Reid*, Id. 269.

nothing from a grant;¹ for a contract executed conveys a *chose in possession*; a contract executory conveys only a *chose in action*.² Since, then, a grant is in fact a contract executed, the obligation of which continues, and since the Constitution uses the general term, *contract*, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the former as well as the latter. A State law, therefore, annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution, as a State law discharging the vendors from the obligation of executing their contracts of sale by conveyances. It would be strange, indeed, if a contract to convey were secured by the Constitution, while an absolute conveyance remained unprotected; that the contract, while executory, was obligatory, but when executed, might be avoided.³ (a)

§ 1377. Contracts, too, are express, or implied. Express contracts are, where the terms of the agreement are openly avowed and uttered at the time of the making of it. Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform.⁴ The Constitution makes no distinction between the one class of contracts and the other. It then equally embraces and applies to both. Indeed, as by far the largest class of contracts in civil society, in the ordinary transactions of life, are implied, there would be very little object in securing the inviolability of express contracts, if those which are implied might be impaired by State legislation. The Constitution is not chargeable with such folly or inconsistency. Every grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert it. A party is, therefore, always estopped by his own grant.⁵ How absurd would it be to provide, that an express covenant by him

¹ Ibid., and 2 Black. Comm. 443.

² 2 Black. Comm. 443.

³ Fletcher v. Peck, 6 Cranch, R. 137.

⁴ 2 Black. Comm. 443.

⁵ Fletcher v. Peck, 6 Cranch's R. 137; Dartmouth College v. Woodward, 4 Wheat. R. 657, 658, 688, 689.

(a) See People v. Platt, 17 Johns. 195; ginia v. Foy, 2 Hayw. 310; Grogan v. Rehoboth v. Hunt, 1 Pick. 224; Lowry v. San Francisco, 18 Cal. 590; Louisville v. Francis, 2 Yerg. 534; University of Vir- University, 15 B. Monr. 642.

as a muniment attendant upon the estate, should bind him forever, because executory and resting in action; and yet, that he might reassert his title to the estate, and dispossess his grantee because there was only an implied covenant not to reassert it.

§ 1378. In the next place, what is the obligation of a contract? (a) It would seem difficult to substitute words more intelligible, or less liable to misconstruction, than these. And yet they have given rise to much acute disquisition as to their real meaning in the Constitution. It has been said, that right and obligation are correlative terms. Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract, then, will consist of that right, or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured, neither by moral law alone, nor by universal law alone, nor by the laws of society alone, but by a combination of the three; an operation, in which the moral law is explained and applied by the law of nature, and

(a) See *Walker v. Whitehead*, 16 Wall. 314 ("the law which binds the parties to perform their agreement"); *Connecticut Life Ins. Co. v. Cushman*, 108 U. S. 51; *Louisiana v. New Orleans*, 102 U. S. 203. In the last case Mr. Justice Field defines the "obligation of a contract" as "the means provided by law by which" the contract "can be enforced, — by which the parties can be obliged to perform it." Hence "whatever legislation lessens the efficacy of these means impairs the obligation." Further, see *Hartman v. Greenhow*, 102 U. S. 672; *Hall v. Wisconsin*, 103 U. S. 5; *United States v. New Orleans*, 103 U. S. 358; *New Haven Co. v. Hamersley*, 104 U. S. 1; *Bonaparte v. Baltimore*, 104 U. S. 592; *Clay v. Society for Savings*, 104 U. S. 579; *New York Guaranty Co. v. Louisiana*, 105 U. S. 622; *New Orleans v. Morris*, 105 U. S. 600; *Greenwood v. Union Freight Co.*, 105 U. S. 13; *Merchants' Bank v. United States*, 101 U. S. 1 (federal tax for paying out the notes of banks, held constitutional, on authority of *Bank v. Fenno*, 8 Wall. 539); *Blount v. Windley*, 95 U. S. 173

(allowing set-off); *Murray v. Charleston*, 96 U. S. 432 (taxing municipal creditors). States are within the provision of the Constitution as well as individuals. *United States v. New Orleans* and *Hall v. Wisconsin*, *supra*. "No State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State treasury.' Much less can a city, 'We will tax our debt to you, and in virtue of the tax withhold a part for our own use.'" *Strong, J.*, in *Murray v. Charleston*, *supra*.

Further as to impairing the obligation, see *McGahey v. Virginia*, 135 U. S. 662, reviewing the recent Virginia coupon cases, touching taxes, *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 U. S. 769; *Virginia Coupon Cases*, 114 U. S. 269; *Barry v. Edmunds*, 116 U. S. 550; *Chaffin v. Taylor*, Id. 567; *Royall v. Virginia*, Id. 572; *Sands v. Edmunds*, Id. 585; *Royall v. Virginia*, 121 U. S. 102; *In re Ayers*, 123 U. S. 443.

both modified and adapted to the exigencies of society by positive law. In an advanced state of society, all contracts of men receive a relative, and not a positive interpretation. The State construes them, the State applies them, the State controls them, and the State decides how far the social exercise of the rights which they give over each party, can be justly asserted.¹ Again, it has been said, that the Constitution distinguishes between a contract and the obligation of a contract. The latter is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it.² Again, it has been said, that the obligation of a contract consists in the power and efficacy of the law, which applies to, and enforces performance of it, or an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract.³ And again, it has been said, that a contract is an agreement of the parties; and if it be not illegal, it binds them to the extent of their stipulations. Thus, if a party contracts to pay a certain sum on a certain day, the contract binds him to perform it on that day, and this is its obligation.⁴

§ 1379. Without attempting to enter into a minute examination of these various definitions and explanations of the obligation of contracts, or of the reasoning by which they are supported and illustrated, there are some considerations which are presupposed by all of them; and others, which enter into some, and are excluded in others.

§ 1380. It seems agreed that, when the obligation of contracts is spoken of in the Constitution, we are to understand not the mere moral, but the legal obligation of contracts. (a) The moral

¹ Per Johnson, J., in *Ogden v. Saunders*, 12 Wheat. R. 281, 285.

² *Ibid.* Washington, J., pp. 257, 258, 259; Thompson, J., pp. 300, 302; Trimble, J., pp. 316.

³ *Ibid.* Trimble, J., pp. 317, 318.

⁴ *Ibid.* Marshall, C. J., pp. 335, 334 to 346; *Sturgis v. Crowninshield*, 4 Wheat. R. 197; *Fletcher v. Peck*, 6 Cranch's R. 137.

(a) See *Louisiana v. Police Jury*, 111 U. S. 716. A mere breach of contract must be distinguished from impairing the obligation of a contract. *Brown v. Colorado*, 106 U. S. 95. Vested rights may be interfered with so long as the obliga-

tion of contracts is not impaired. *Randall v. Krieger*, 23 Wall. 137 (as to laws touching property rights arising by marriage). See also *Maynard v. Hill*, 125 U. S. 190, on the same point.

obligation of contracts is, so far as human society is concerned, of an imperfect kind, which the parties are left free to obey or not, as they please. It is addressed to the conscience of the parties under the solemn admonitions of accountability to the Supreme Being. No human lawgiver can either impair or reach it. The Constitution has not in contemplation any such obligations, but such only as might be impaired by a State, if not prohibited.¹ It is the civil obligation of contracts which it is designed to reach; that is, the obligation which is recognized by and results from the law of the State in which it is made. If, therefore, a contract, when made, is, by the law of the place, declared to be illegal, or deemed to be a nullity, or a *nude pact*, it has no civil obligation, because the law in such cases forbids its having any binding efficacy or force. It confers no legal right on the one party, and no correspondent legal duty on the other. There is no means allowed or recognized to enforce it; for the maxim is, *ex nudo pacto non oritur actio*. But when it does not fall within the predicament of being either illegal or void, its obligatory force is coextensive with its stipulations.

§ 1381. Nor is this obligatory force so much the result of the positive declarations of the municipal law, as of the general principles of natural, or (as it is sometimes called) universal law. In a state of nature, independent of the obligations of positive law, contracts may be formed, and their obligatory force be complete.² Between independent nations, treaties and compacts are formed which are deemed universally obligatory; and yet, in no just sense, can they be deemed dependent on municipal law.³ Nay, there may exist (abstractly speaking) a perfect obligation in contracts, where there is no known and adequate means to enforce them. As, for instance, between independent nations, where their relative strength and power preclude the possibility, on the side of the weaker party, of enforcing them. So in the same government, where a contract is made by a State with one of its own citizens, which yet its laws do not permit to be enforced by any action or suit. In this predicament are the United States, who are not suable on any contracts made by themselves; but no one doubts that these are still obligatory on the United States.

¹ Ogden v. Saunders, 12 Wheat. R. 257, 258, 280, 281, 300, 316 to 318, 337, 338.

² Ogden v. Saunders, 12 Wheat. R. 281, 282; Id. 344 to 346; Id. 350.

³ Id. 280, 281, 344 to 346.

Yet their obligation is not recognized by any positive municipal law, in a great variety of cases. It depends altogether upon principles of public or universal law. Still, in these cases, there is a right in the one party to have the contract performed, and a duty on the other side to perform it. But, generally speaking, when we speak of the obligation of a contract, we include in the idea some known means acknowledged by the municipal law to enforce it. Where all such means are absolutely denied, the obligation of the contract is understood to be impaired, though it may not be completely annihilated. Rights may, indeed, exist, without any present adequate correspondent remedies between private persons. Thus, a State may refuse to allow imprisonment for debt; and the debtor may have no property. But still the right of the creditor remains; and he may enforce it against the future property of the debtor.¹ So a debtor may die without leaving any known estate, or without any known representative. In such cases, we should not say that the right of the creditor was gone; but only that there was nothing on which it could presently operate. But suppose an administrator should be appointed, and property in contingency should fall in, the right might then be enforced to the extent of the existing means.

§ 1382. The civil obligation of a contract, then, though it can never arise or exist contrary to positive law, may arise or exist independently of it;² and it may exist, notwithstanding there may be no present adequate remedy to enforce it. Wherever the municipal law recognizes an absolute duty to perform a contract, there the obligation to perform it is complete, although there may not be a perfect remedy.

§ 1383. But much diversity of opinion has been exhibited upon another point,—how far the existing law enters into and forms a part of the contract. (a) It has been contended, by some learned minds, that the municipal law of a place where a contract is made forms a part of it, and travels with it, wherever the parties to it may be found.³ If this were admitted to be true, the consequence would be, that all the existing laws of a State, being

¹ See *Sturgis v. Crowninshield*, 4 Wheat. 200, 201; *Mason v. Haile*, 12 Wheat. R. 370.

² *Ogden v. Saunders*, 12 Wheat. R. 344 to 346; *Id.* 350.

³ *Id.* 259, 260; *Id.* 297, 298, 302.

(a) See *Walker v. Whitehead*, 16 Wall. 314.

incorporated into the contract, would constitute part of its stipulations, so that a legislative repeal of such laws would not in any manner affect it.¹ Thus, if there existed at the time a statute of limitations operating on such contracts, or an insolvent act under which they might be discharged, no subsequent repeal of either could vary the rights of the parties, as to using them as a bar to a suit upon such contracts. If, therefore, the legislature should provide, by a law, that all contracts thereafter made should be subject to the entire control of the legislature, as to their obligation, validity, and execution, whatever might be their terms, they would be completely within the legislative power, and might be impaired or extinguished by future laws; thus having a complete *ex post facto* operation. Nay, if the legislature should pass a law declaring that all future contracts might be discharged by a tender of any thing or things besides gold and silver, there would be great difficulty in affirming them to be unconstitutional; since it would become a part of the stipulations of the contract. And yet it is obvious, that it would annihilate the whole prohibition of the Constitution upon the subject of tender laws.²

§ 1384. It has, therefore, been judicially held, by a majority of the Supreme Court, that such a doctrine is untenable. Although the law of the place acts upon a contract, and governs its construction, validity, and obligation, it constitutes no part of it. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of States, by arresting their power to repeal or modify such laws, with respect to existing contracts.³ The law necessarily steps in to explain and construe the stipulations of parties, but never to supersede or vary them. A great mass of human transactions depends upon implied contracts, upon contracts not written, which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that the parties have made these stipulations, it does not vary their contract, or introduce new terms into it; but it declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their per-

¹ *Ogden v. Saunders*, 12 Wheat. R. 260, 261, 262, 284, 336 to 339.

² *Id.* 284, 324, 325, 336 to 339.

³ *Id.* 343.

formance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.¹ So, if there be a written contract, which does not include every term which is ordinarily and fairly to be implied, as accompanying what is stated, the law performs the office only of expressing what is thus tacitly admitted by the parties to be a part of their intention. To such an extent the law acts upon contracts. It performs the office of interpretation. But this is very different from supposing that every law applicable to the subject-matter, as a statute of limitations or a statute of insolvency, enters into the contract, and becomes a part of the contract. Such a supposition is neither called for by the terms of the contract, nor can be fairly presumed to be contemplated by the parties, as matters *ex contractu*. The parties know that they must obey the laws, and that the laws act upon their contracts, whatever may be their intention.²

§ 1385. In the next place, What may properly be deemed impairing the obligation of contracts in the sense of the Constitution? (a) It is perfectly clear, that any law, which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases.³ (b)

¹ Ogden v. Saunders, 12 Wheat. R. 341, 342.

² Id. 284, 324, 325, 338, 339, 340, 343, 354.

³ Id. 256; Id. 327; Golden v. Prince, 3 Wash. Cir R. 319.

(a) A law which gives validity to a void contract cannot be said to impair the obligation of that contract. *Satterlee v. Mathewson*, 2 Peters, 412; *Watson v. Mercer*, 8 Peters, 110; *Gross v. United States Mortgage Co.*, 108 U. S. 477. Hence it is laid down "that the right of a defendant to avoid his contract [for usury] is given by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri* and

not realized by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract." Mr. Justice Matthews, in *Ewell v. Daggs*, 108 U. S. 143, quoted with approval in *Gross v. United States Mortgage Co.*, Id. 477.

(b) *Louisiana v. New Orleans*, 102 U. S. 203; *Antoni v. Greenhow*, 107 U. S. 769; *Walker v. Whitehead*, 16 Wall. 317.

Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, (a) imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation.¹ (b) *A fortiori*, a law, which makes the contract wholly

¹ *Green v. Biddle*, 8 Wheat. R. 1, 84.

(a) *Louisiana v. New Orleans*, *supra*.

(b) A few illustrations of the principle stated in the text may be desirable. In *Bronson v. Kinzie*, 1 How. 311, it was decided that a statute which forbade any sale under a mortgage foreclosure, at less than two-thirds the appraised value, was void as to mortgages previously made. See a similar decision in *McCracken v. Hayward*, 2 How. 608. In *Robinson v. Howe*, 13 Wis. 341, it was held that a statute passed after a sale had been made, extending the time to make redemption from it, was void. And if it shortened the time it would be equally void. *Cargill v. Power*, 1 Mich. 369. In *Mundy v. Monroe*, 1 Mich. 56, a statute taking away from mortgagees the right to possession under their mortgages was held void as to those previously given. There is undoubtedly no little difficulty in determining in some cases whether a statute is to be regarded as a modification of the remedy merely, or whether, on the other hand, it takes away rights conferred by the contract. The one is entirely within the province of the State; the other is prohibited. *Curran v. Arkansas*, 15 How. 304; *Morton v. Valentine*, 15 La. An. 153; *Stephenson v. Osborne*, 41 Miss. 119; *Oatman v. Bond*, 15 Wis. 28. Courts, and the proceedings therein, are subject to modification at all times, and the changes may have the effect seriously to delay remedies; and in some cases it has been held that statutes staying all writs against particular classes of persons — as, for instance, enlisted soldiers — were valid. *Johnson v. Higgins*, 3 Met. (Ky.) 566, *Farnsworth v. Vance*, 2 Cold. 108. In others it is decided that stay of execu-

tion — as, for instance, during an existing war — is void. *Taylor v. Stearns*, 18 Grat. 244; *Aycock v. Martin*, 37 Ga. 124; *Hudspeth v. Davis*, 41 Ala. 389; *Coffman v. Bank of Kentucky*, 40 Miss. 29; *Jacobs v. Smallwood*, 63 N. C. 112; *Cutts v. Hardee*, 38 Ga. 350; *Sequestration Cases*, 30 Texas, 688; *Clark v. Martin*, 3 Grant (Pa.) 393; *Edwards v. Kearzey*, 96 U. S. 595.

Other cases of laws invalid as violating the obligation of contracts are the following: A law which takes from a municipal corporation the power to levy taxes to pay existing debts. *Van Hoffman v. Quincy*, 4 Wall. 535. One which subjects a private corporation to forfeiture of its franchise for that which was not cause of forfeiture originally. *People v. Jackson, &c. P. Road Co.*, 9 Mich. 285; *State v. Tombeckbee Bank*, 2 Stew. 30; *Ireland v. Turnpike Co.*, 19 Ohio N. s. 373. One which repeals a statute making the stockholders in a corporation liable for its debts contracted while it was in force. *Hawthorne v. Calef*, 2 Wall. 10. One authorizing stay of execution in a case where the debtor had expressly waived it. *Billmeyer v. Evans*, 40 Penn. St. 324; *Lewis v. Lewis*, 44 Penn. St. 127. But compare these last with *Conkey v. Hart*, 14 N. Y. 30. See for further illustrations, *Phalen v. Virginia*, 8 How. 163; *Beers v. Arkansas*, 20 How. 527; *Aspinwall v. Commissioners*, 22 How. 364; *Wabash & Erie Canal v. Beers*, 2 Black, 448; *Gilman v. Sheboygan*, 2 Black, 510; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Turnpike Co. v. State*, 3 Wall. 210; *Amy v. Shelby Taxing District*, 114 U. S. 387; *Poindexter v. Greenhow*, Id. 270; *Effinger*

invalid, or extinguishes, or releases it, is a law impairing it.¹ (a) Nor is this all. Although there is a distinction between the obligation of a contract, and a remedy upon it, yet, if there are certain remedies existing at the time when it is made, all of which are afterwards wholly extinguished by new laws, so that there remain no means of enforcing its obligation, and no redress; such an abolition of all remedies operating *in presenti* is also an impairing of the obligation of such contract.² (b) But every change and modification of the remedy does not involve such a consequence. No one will doubt, that the legislature may vary the nature and extent of remedies, so always that some substantive remedy be in fact left. (c) Nor can it be doubted, that the legis-

¹ *Sturgis v. Crowninshield*, 4 Wheat. R. 197, 198.

² *Ogden v. Saunders*, 12 Wheat. R. 284, 285, 327, 349, 350, 351, 352, 353; *Sturgis v. Crowninshield*, 4 Wheat. R. 200, 201, 207; *Smith v. Morse*, 2 Cal. 524.

v. Kenney, 115 U. S. 566 (Confederate money); *Wilmington R. Co. v. King*, 91 U. S. 3 (Confederate money); *Hoff v. Jasper Co.*, 110 U. S. 53; *Anthony v. Jasper Co.*, 101 U. S. 693; *Farrington v. Tennessee*, 95 U. S. 679; *Tennessee v. Sneed*, 96 U. S. 69; *United States v. Memphis*, 97 U. S. 284 (added city wards exempted from taxation for prior debts); *Keith v. Clark*, 97 U. S. 454 (notes of a bank payable in taxes afterwards by legislation refused that property); *Ochiltree v. Iowa Contracting Co.*, 21 Wall. 249; *Garrison v. New York*, Id. 196; *Erie Ry. Co. v. Pennsylvania*, Id. 492; *Curtis v. Whitney*, 13 Wall. 68.

(a) In *Allen v. McKean*, 1 Sumner, 278, it was held, that where a person holds an office during good behavior with a fixed salary and certain fees annexed thereto, the tenure of the office cannot be altered without impairing the obligation of a contract. But appointments to any State office are not within the provision of the United States Constitution; and the State legislature may increase or diminish the salary of a State officer unless prohibited by the State Constitution. *Benford v. Gibson*, 15 Ala. 521; *The State v. Smedes*, 4 Cushman, 47; *Butler v. Pennsylvania*, 10 How. 402; Common-

wealth *v. Bacon*, 6 S. & Rawle, 322; *Commonwealth v. Mann*, 5 Watts & S. 418; *Barker v. Pittsburgh*, 4 Barr, 51; *Warner v. The People*, 2 Denio, 272; *Conner v. New York*, 1 Selden, 285.

(b) See *Call v. Hagger*, 8 Mass. 430; *Griffin v. Wilcox*, 21 Ind. 370; *Penrose v. Erie Canal Co.*, 56 Penn. St. 46; *Oatman v. Bond*, 15 Wia. 28; *Bowdoinham v. Richmond*, 6 Greenl. 12; *United States v. Conway*, Hempst. 313; *Johnson v. Bond*, Id. 533; *Osborn v. Nicholson*, 13 Wall. 662; *Chapman v. Douglas*, 107 U. S. 348.

It is not competent for the legislature to deprive persons of the right to maintain suits because of their having participated in or sympathized with rebellion against the government. *Rison v. Farr*, 24 Ark. 161; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler*, Id. 117. Contracts for the purchase or hire of slaves, valid when made, cannot be made void by State law afterwards. *White v. Hart*, 13 Wall. 649; *Osborn v. Nicholson*, Id. 653.

(c) See *McGahey v. Virginia*, 135 U. S. 662; *Antoni v. Greenhow*, 107 U. S. 769; *Ewell v. Daggs*, 108 U. S. 143; *Gross v. United States Mortgage Co.*, Id. 477; *Chapman v. Douglas*, 107 U. S. 348; *Cairo R. Co. v. Hecht*, 95 U. S. 168

lature may prescribe the times and modes in which remedies may be pursued; and bar suits not brought within such periods, and not pursued in such modes. Statutes of limitations are of this nature; and have never been supposed to destroy the obligation of contracts, but to prescribe the times within which that obligation shall be enforced by a suit; and in default to deem it either

(changing mode of service of process); *Edwards v. Kearzey*, 96 U. S. 595; *Memphis v. United States*, 97 U. S. 293; *Memphis v. Brown*, Id. 300; *Walker v. Whitehead*, 16 Wall. 314; *Collector v. Hubbard*, 12 Wall. 1 (that there can be no vested right in a particular remedy); *Morse v. Gould*, 1 Kernan, 281; *Stocking v. Hunt*, 3 Denio, 274; *Van Rensselaer v. Snyder*, 3 Kernan, 299. It is not a sufficient objection to a law changing the remedy, that it gives one less convenient than the old, or less prompt and speedy. *Ogden v. Saunders*, 12 Wheat. 213; *Mason v. Haile*, Id. 370; *Beers v. Haughton*, 9 Pet. 359; *Evans v. Montgomery*, 4 W. & S. 218; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Tarpley v. Hamer*, 17 Miss. 310; *Quackenbush v. Danks*, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Rockwell v. Hubbell*, Id. 197; *Sprecker v. Wakelee*, 11 Wis. 432; *Smith v. Packard*, 12 Wis. 371; *Holloway v. Sherman*, 12 Iowa, 282; *Penrose v. Erie Canal Co.*, 56 Penn. St. 46.

"It is competent," said Mr. Justice Swayne, in *Von Hoffman v. Quincy*, 4 Wall. 553, "for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the time between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." To this it is added by Chief Justice Waite, in *Antoni v. Greenhow*, 107 U. S. 769, that the question in all

such cases is one of reasonableness, of which the Legislature is primarily the judge. *Jackson v. Lamphire*, 3 Peters, 290; *Terry v. Anderson*, 95 U. S. 633. A statute should not be pronounced invalid unless a palpable error has been committed. *Antoni v. Greenhow*, *supra*. The motive of the Legislature is immaterial. *Ibid.*; *Minnesota v. Barber*, 136 U. S. 313. See further as to reasonableness of time allowed by the Legislature, *McGahey v. Virginia*, 135 U. S. 662.

A statute allowing the defence of want of consideration to be made to a valid instrument previously given, was sustained in *Williams v. Haines*, 27 Iowa, 251. See also *Parsons v. Casey*, 28 Iowa, 436; *Curtis v. Whitney*, 13 Wall. 68; *Cook v. Gregg*, 48 N. Y. 439. A State may also take away the common-law remedy altogether, provided another and efficient one remains. *Van Rensselaer v. Snyder*, 13 N. Y. 299. Even though the parties have stipulated by their contract that the particular remedy (*e. g.* distress for rent) shall be had. *Conkey v. Hart*, 14 N. Y. 30. So too a judgment lien may be taken away where a sufficient remedy remains. *Watson v. N. Y. Central R. R. Co.*, 47 N. Y. 157. And a State may from time to time change the rules of evidence and make the new regulations apply to existing causes of action, and even to pending suits. Per Marshall, Ch. J., in *Ogden v. Saunders*, 12 Wheat. 249; *Neass v. Mercer*, 15 Barb. 318; *Rich v. Flanders*, 39 N. H. 323. See *Curtis v. Whitney*, 13 Wall. 68.

It is not competent to compel a public creditor to surrender his securities, and accept others bearing a less interest. *Brewer v. Otoe County*, 1 Neb. 373.

satisfied or abandoned.¹ (a) The obligation to perform a contract is coeval with the undertaking to perform it. It originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon the broken contract, and enforces a pre-existing obligation.² And a State legislature may discharge a party from imprisonment upon a judgment in a civil case of contract, without infringing the Constitution; for this is but a modification of the remedy, and does not impair the obligation of the contract.³ (b) So, if a party should be in jail, and give a bond for the prison liberties, and to remain a true prisoner until lawfully discharged, a subsequent discharge by an act of the legislature would not impair the contract; for it would be a lawful discharge in the sense of the bond.⁴ (c)

¹ *Sturgis v. Crowninshield*, 4 Wheat. R. 200, 206, 207; *Mason v. Haile*, 12 Wheat. R. 370, 380, 381; *Ogden v. Saunders*, 12 Wheat. R. 262, 263, 349, 350; *Hawkins v. Barney's Lessee*, 5 Peters's Sup. R. 457.

² *Ogden v. Saunders*, 12 Wheat. R. 349, 350.

³ *Mason v. Haile*, 12 Wheat. R. 370.

⁴ *Ibid.*

(a) *Campbell v. Holt*, 115 U. S. 620; *Mitchell v. Clark*, 110 U. S. 633; *Vance v. Vance*, 108 U. S. 514, requiring registration of mortgages within a certain time; *Louisiana v. New Orleans*, 102 U. S. 203, requiring registration of judgments against a city; *Giffillan v. Union Canal Co.*, 109 U. S. 401; *Jackson v. Lamphire*, 3 Peters, 290; *Terry v. Anderson*, 95 U. S. 634; *Chemung Bank v. Lowry*, 93 U. S. 72.

(b) *Penniman's Case*, 103 U. S. 714. So a State may make laws increasing exemptions of property from execution applicable to future, but not as to past, contracts. *Edwards v. Kearzey*, 96 U. S. 595; *Gunn v. Berry*, 15 Wall. 610; *Wilson v. Brown*, 58 Ala. 62; *Johnson v. Fletcher*, 54 Miss. 628; *Homestead Cases*, 22 Gratt. 266. See *Bronson v. Kinzie*, 1 How. 311; *Mason v. Haile*, 12 Wheat. 370; *Rockwell v. Hubbell*, 1 Doug. (Mich.) 197; *Quackenbush v. Danks*, 1 Denio, 128, 3 Denio, 594; s. c. 1 N. Y. 129; *Morse v. Goold*, 11 N. Y. 281; *Sprecker v. Wakelee*, 11 Wis. 432; *Cusic v. Douglass*, 3 Kansas, 123; *Maxey v.*

Loyal, 38 Ga. 531; *Hardiman v. Downer*, 39 Ga. 425; *Hill v. Kersler*, 63 N. C. 437. But see *Kibbey v. Jones*, 7 Bush, 243. The State may exempt particular property from taxation. *Charleston v. Branch*, 15 Wall. 470; *Delaware R. Tax*, 18 Wall. 206; *Trask v. Maguire*, *Id.* 391.

(c) Usury laws may be repealed. *Ewell v. Daggs*, 108 U. S. 143; *Curtis v. Leavitt*, 15 N. Y. 9. If what was given by the State in aid of a creditor was not a legal remedy, it may be taken away. *Memphis R. Co. v. Tennessee*, 101 U. S. 337; *South Alabama R. Co. v. Alabama*, 101 U. S. 832. A party has no vested right to an appeal to another court; and the appeal may be taken away. *Baltimore R. Co. v. Grant*, 98 U. S. 398.

One of the tests whether a contract is impaired by legislation is to consider whether its value has been diminished. And that is not a question of degree, but of encroachment in any material respect upon the obligation. *Edwards v. Kearzey*, 96 U. S. 595; *Bank v. Sharp*, 6 How. 301. And such encroachment may be by legislation upon the remedy. *Ibid.*

§ 1386. These general considerations naturally conduct us to some more difficult inquiries growing out of them; and upon which there has been a very great diversity of judicial opinion. The great object of the framers of the Constitution undoubtedly was, to secure the inviolability of contracts. This principle was to be protected in whatever form it might be assailed. No enumeration was attempted to be made of the modes by which contracts might be impaired. It would have been unwise to have made such an enumeration, since it might have been defective; and the intention was to prohibit every mode or device for such purpose. The prohibition was universal.¹

§ 1387. The question has arisen, and has been most elaborately discussed, how far the States may constitutionally pass an insolvent law which shall discharge the obligation of contracts. It is not doubted, that the States may pass insolvent laws which shall discharge the person, or operate in the nature of a *cessio bonorum*, provided such laws do not discharge or intermeddle with the obligation of contracts. Nor is it denied, that insolvent laws which discharge the obligation of contracts, made antecedently to their passage, are unconstitutional.² But the question is, how far the States may constitutionally pass insolvent laws, which shall operate upon and discharge contracts which are made subsequently to their passage. After the most ample argument, it has at length been settled by a majority of the Supreme Court, that the States may constitutionally pass such laws operating upon future contracts.

§ 1388. The learned judges who held the affirmative were not all agreed as to the grounds of their opinions. But their judgment rests on some one of the following grounds: (1) Some of the judges held, that the law of the place where a contract is made not only regulates and governs it, but constitutes a part of the contract itself; and, consequently, that an insolvent law, which, in the event of insolvency of the party, authorizes a discharge of the contract, is obligatory as a part of the contract. (2) Others held, that, though the law of the place formed no part of the contract, yet the latter derived its whole obligation from that law, and was controlled by its provisions; and, con-

¹ *Sturgis v. Crowninshield*, 4 Wheat. R. 199, 200.

² *Sturgis v. Crowninshield*, 4 Wheat. R. 122; *Farmers and Mechanics Bank v. Smith*, 6 Wheat. R. 131; *Ogden v. Saunders*, 12 Wheat. R. 213.

sequently, that its obligation could extend no further than the law which caused the obligation; and if it was subject to be discharged in case of insolvency, the law so far controlled and limited its obligation. (3) That the connection with the other parts of the clause (bills of attainder and *ex post facto* laws), as they applied to retrospective legislation, fortified the conclusion, that the intention in this part was only to prohibit the like legislation. (4) That the known history of the country, as to insolvent laws, and their having constituted a part of the acknowledged jurisprudence of several of the States for a long period, forbade the supposition that under such a general phrase, as laws impairing the obligation of contracts, insolvent laws, in the ordinary administration of justice, could have been intentionally included. (5) That, whenever any person enters into a contract, his assent may be properly inferred to abide by those rules in the administration of justice, which belong to the jurisprudence of the country of the contract. And, when he is compelled to pursue his debtor in other States, he is equally bound to acquiesce in the law of the latter, to which he subjects himself. (6) That the law of the contract remains the same everywhere, and will be the same in every tribunal. But the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice, known to the policy of each State severally. These, and other auxiliary grounds, which were illustrated by a great variety of arguments, which scarcely admit of abridgment, were deemed satisfactory to the majority of the court.

§ 1389. The minority of the judges maintained their opinions upon the following grounds: (1) That the words of the clause in the Constitution, taken in their natural and obvious sense, admit of a prospective as well as of a retrospective operation. (2) That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law. (3) That contracts derive their obligation from the act of the parties, and not from the grant of the government. And the right of the government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability, after they have been formed. (4) That the obligation of a contract

is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy. Nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties. (5) That the history of the times justified this interpretation of the clause. The power of changing the relative situation of debtor and creditor, and of interfering with contracts, had been carried to such an excess by the State legislature, as to break in upon all the ordinary intercourse of society, and to destroy all private confidence. It was a great object to prevent for the future such mischievous measures. (6) That the clause, in its terms, purports to be perpetual; and the principle, to be of any value, must be perpetual. It is expressed in terms sufficiently broad to operate in all future times; and the just inference, therefore, is, that it was so intended. But if the other interpretation of it be adopted, the clause will become of little effect; and the Constitution will have imposed a restriction, in language indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force at any given time is but of short duration; and if the prohibition be of retrospective laws only, a very short lapse of time will remove every subject upon which State laws are forbidden to operate, and make this provision of the Constitution so far useless. Instead of introducing a great principle, prohibiting all law of this noxious character, the Constitution will suspend their operation only for a moment, or except pre-existing cases from it. The nature of the provision is thus essentially changed. Instead of being a prohibition to pass laws impairing the obligation of contracts, it is only a prohibition to pass retrospective laws. (7) That there is the less reason for adopting such a construction, since the State laws, which produced the mischief, were prospective as well as retrospective.¹

§ 1390. The question is now understood to be finally at rest; and State insolvent laws, discharging the obligation of future contracts, are to be deemed constitutional. Still a very important point remains to be examined; and that is, to what contracts such laws can rightfully apply. The result of the various decisions on this subject is: (1) That they apply to all contracts made within the State between citizens of the State. (2) That they do

¹ See *Ogden v. Saunders*, 12 Wheat. R. pp. 254 to 357.

not apply to contracts made within the State between a citizen of a State and a citizen of another State. (u) (3) That they do not apply to contracts not made within the State. In all these cases, it is considered that the State does not possess a jurisdiction, co-extensive with the contract, over the parties; and therefore that the Constitution of the United States protects them from prospective as well as retrospective legislation.¹ Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a State which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act, and be deemed to have abandoned this extraterritorial immunity.² (b) Of course the constitutional prohibition does not apply to insolvent or other laws passed before the adoption of the Constitution, operating upon contracts and rights of property vested and *in esse* before that time.³ And it may be added, that State insolvent laws have no operation whatsoever on contracts made with the United States; for such contracts are in no manner whatsoever subject to State jurisdiction.⁴ (c)

§ 1391. It has been already stated, that a grant is a contract within the meaning of the Constitution, as much as an unexecuted agreement. The prohibition, therefore, equally reaches all interferences with private grants and private conveyances, of whatever nature they may be. But it has been made a question, whether it applies, in the same extent, to contracts and grants of a State created directly by law, or made by some authorized agent in pursuance of a law. It has been suggested, that, in such cases, it is to be deemed an act of the legislative power; and that all laws are repealable by the same authority which enacted them. But it has been decided upon solemn argument,

¹ *Ogden v. Saunders*, 12 Wheat. R. 358; *McMullen v. McNeill*, 4 Wheat. R. 209.

² *Clay v. Smith*, 3 Peters's Sup. R. 411.

³ *United States v. Wilson*, 8 Wheat. R. 253.

⁴ *Owings v. Speed*, 5 Wheat. R. 420.

(a) See *Woodhull v. Wagner*, Baldw. 300; *Springer v. Foster*, 2 Story C. C. 387; *Boyle v. Zacharie*, 6 Pet. 348; *Suydam v. Broadnax*, 14 Pet. 75; *Cook v. Moffat*, 5 How. 310; *Baldwin v. Hale*, 1 Wall. 231. Even though they are made payable within the State passing the law. *Baldwin v. Hale*, *supra*.

(b) *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409.

(c) The whole subject has long been at rest, and the question of the limits which might exist to State authority to pass insolvent laws, in the absence of such a statute, has become comparatively unimportant.

that contracts and grants made by a State are not less within the reach of the prohibition than contracts and grants of private persons; that the question is not, whether such contracts or grants are made directly by law in the form of legislation, or in any other form, but whether they exist at all. The legislature may, by a law, directly make a grant; and such grant, when once made, becomes irrevocable, and cannot be constitutionally impaired. So the legislature may make a contract with individuals directly by a law, pledging the State to a performance of it; and then, when it is accepted, it is equally under the protection of the Constitution.¹ (a) Thus, where a State authorized a sale of its public lands, and the sale was accordingly made, and conveyances given, it was held that those conveyances could not be rescinded or revoked by the State.² So where a State, by a law, entered into a contract with certain Indians to exempt their lands from taxation for a valuable consideration, it was held that the exemption could not be revoked.³ (b) And grants of

¹ *Charles River Bridge v. Warren Bridge*, 11 Peters, 549.

² *Fletcher v. Peck*, 6 Cranch, 87, 135; 1 Kent's Comm. Lect. 19, p. 388.

³ *New Jersey v. Wilson*, 7 Cranch, 164; 1 Kent's Comm. Lect. 19, p. 389.

(a) Where a State was the owner of the stock in a bank, and by statute the bills of the bank were to be received in payment of all debts due to the State, it was held that the statute established a contract between the State and those receiving the bills under it, and its repeal could not deprive the bill-holders of the rights assured by it. *Woodruff v. Trapnall*, 10 How. 190. See also *Furman v. Nichol*, 8 Wall. 44; *Winter v. Jones*, 10 Ga. 190; *People v. Auditor-General*, 9 Mich. 327; *Montgomery v. Kasson*, 16 Cal. 189; *Adams v. Palmer*, 51 Me. 580.

(b) Although the State courts have sometimes protested against the doctrine (see cases in *Cooley's Const. Limitations*, 280, note), it must be considered as settled now that a State may make a valid agreement exempting property from taxation, or not to levy taxes beyond a certain rate or amount. See, in addition to the case in 7 Cranch, *Gordon v. Appeal Tax Court*, 3 How. 133; *Piqua Bank v. Knoup*, 16 How. 369; *Ohio Life & Trust Co. v.*

Debolt, Id. 416; *Dodge v. Woolsey*, 18 How. 331; *Mechanics & Traders Bank v. Debolt*, Id. 380; *The Same v. Thomas*, Id. 384; *McGee v. Mathis*, 4 Wall. 143; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Washington University v. Rouse*, Id. 439; *Wilmington, &c. R. R. Co. v. Reid*, 13 Wall. 264; *Raleigh, &c. R. R. Co. v. Reid*, Id. 269. In any case, however, there must be a consideration, so that the State can be supposed to have received a beneficial equivalent for the right relinquished: if the exemption is made as a mere privilege it may be revoked at any time. *Christ's Church v. Philadelphia*, 24 How. 300; *East Saginaw Salt Manuf. Co. v. East Saginaw*, 19 Mich. 259, affirmed in 13 Wall. 373; *Brainerd v. Colchester*, 31 Conn. 410; *People v. Commissioners of Taxes*, 47 N. Y. 501. See also *Dole v. The Governor*, 3 Stew. 387; *Commonwealth v. Bird*, 12 Mass. 442. But in a private act of incorporation the State is always supposed to receive an equivalent for the franchises and

land, once voluntarily made by a State by a special law, or under general laws, when once perfected, are equally as incapable of being resumed by a subsequent law, as those founded on a valuable consideration. Thus, if a State grant glebe lands or other lands to parishes, towns, or private persons gratuitously, they constitute irrevocable executed contracts.¹ And it may be laid down, as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired. A grant, as has been already stated, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert it.² (a)

§ 1392. The cases above spoken of are cases in which rights of property are concerned, and are, manifestly, within the scope of the prohibition. But a question of a more nice and delicate nature has been also litigated; and that is, how far charters granted by a State are contracts within the meaning of the Constitution. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, is admitted; and it has never been so construed. It has always been understood, that the contracts spoken of in the Constitution were those which respected property, or some other object of value, and which conferred rights capable of being asserted in a court of justice.³ A charter

¹ *Terrett v. Taylor*, 9 Cranch, 52; *Town of Pawlet v. Clarke*, 9 Cranch, 535; 1 Kent's Comm. Lect. 19, p. 389.

² *Fletcher v. Peck*, 6 Cranch, 87, 135; 1 Kent's Comm. Lect. 19, p. 38.

³ *Dartmouth College v. Woodward*, 4 Wheat. R. 513, 629.

privileges conferred. See *Piqua Bank v. Knoup*, *supra*.

If, however, an exemption from taxation exists in any case, it must be the result of a deliberate intention to relinquish this prerogative of sovereignty, deliberately manifested. It is not to be inferred from ambiguous language. *Providence Bank v. Billings*, 4 Pet. 561; *Christ's Church v. Philadelphia*, 24 How. 302; *Gilman v. Sheboygan*, 2 Black. 513; *Herrick v. Randolph*, 13 Vt. 531; *Easton Bank v. Commonwealth*, 10 Penn. St. 450; *People v. Roper*, 35 N. Y. 629.

It has never been held that a State might by contract preclude itself from exercising the police power; but, on the contrary, all grants and all charters are understood to be made subject to it. See *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 149; and numerous cases collected in *Cooley, Const. Limitations*, 232 to 234, 574 to 581, notes C.

(a) So of grants made, *e. g.* to a college, under statutory exemptions applying to the same. *Northwestern Univ. v. People*, 99 U. S. 309.

is certainly in form and substance a contract; it is a grant of powers, rights, and privileges; and it usually gives a capacity to take and to hold property. Where a charter creates a corporation, it emphatically confers this capacity; for it is an incident to a corporation (unless prohibited) to take and to hold property. A charter granted to private persons, for private purposes, is within the terms and the reason of the prohibition. It confers rights and privileges, upon the faith of which it is accepted. It imparts obligations and duties on their part, which they are not at liberty to disregard; and it implies a contract on the part of the legislature, that the rights and privileges so granted shall be enjoyed. It is wholly immaterial, in such cases, whether the corporation take for their own private benefit, or for the benefit of other persons. A grant to a private trustee, for the benefit of a particular *cestui que trust*, is not less a contract than if the trustee should take for his own benefit. A charter to a bank, or insurance, (a) or turnpike company, is certainly a contract, founded in a valuable consideration.¹ (b) But it is not more so than a charter incorporating persons for the erection and support of a hospital for the aged, the sick, or the infirm, which is to be supported by private contributions or is founded upon private charity. If the State should make a grant of funds, in aid of such a corporation, it has never been supposed that it could revoke it at its pleasure. It would have no remaining authority over the corporation, but that which is judicial, to enforce the proper administration of the trust. Neither is a grant less a contract, though no beneficial interest accrues to the possessor. Many a purchase, whether corporate or not, may, in point of fact, be of no exchangeable value to the owners; and yet the grants confirming them are not less within the protection of the Constitution. All incorporeal hereditaments, such as immunities, dignities, offices, and franchises, are in law deemed valuable rights, and wherever they are subjects of a contract or grant they are just as much within the reach of the Constitution as any other grants; for the Constitution makes no account of the greater or less value of anything granted. All corporate franchises are

¹ See *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 11 Peters's R. 549, where the obligations resulting from a charter are fully discussed.

(a) See *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574.

(b) *St. Anne's Asylum v. New Orleans*, 105 U. S. 362.

legal estates. They are powers coupled with an interest; and the corporators have vested rights in their character as corporators.¹

§ 1393. A charter, then, being a contract within the scope of the Constitution, the next consideration which has arisen upon this important subject is, whether the principle applies to all charters, public as well as private. Corporations are divisible into two sorts,—such as are strictly public, and such as are private. Within the former denomination are included all corporations created for public purposes only, such as cities, towns, parishes, and other public bodies.² Within the latter denomination all corporations are included which do not strictly belong to the former. There is no doubt, as to public corporations, which exist only for public purposes, that the legislature may change, modify, enlarge, and restrain them; with this limitation, however, that property, held by such corporation, shall still be secured for the use of those for whom, and at whose expense, it has been acquired. The principle may be stated in a more general form. If a charter be a mere grant of political power; if it create a civil institution, to be employed in the administration of the government; or if the funds be public property alone, and the government alone be interested in the management of them, the legislative power over such charter is not restrained by the Constitution, but remains unlimited.³(a) The reason is, that it is only a mode of exercising public rights and public powers, for

¹ *Dartmouth College v. Woodward*, 4 Wheat. R. 518, 629, 630, 636, 638, 644, 645, 646, 647, 653, 656, 657, 658, 697, 698, 699, 700, 701, 702.

² *Terrett v. Taylor*, 9 Cranch, 52; *Dartmouth College v. Woodward*, 4 Wheat. R. 663, 694.

³ *Dartmouth College v. Woodward*, 4 Wheat. R. 518, 629, 630, 659, 663, 694 to 701.

(a) See *People v. Morris*, 13 Wend. 331; *St. Louis v. Russel*, 9 Mo. 507; *Reynolds v. Baldwin*, 1 La. An. 162; *Police Jury v. Shreveport*, 5 La. An. 665; *Trustees of Schools v. Tatman*, 13 Ill. 30; *Montpelier v. East Montpelier*, 29 Vt. 12; *Mt. Carmel v. Wabash Co.*, 50 Ill. 69; *East Hartford v. Hartford Bridge Co.*, 10 How. 533.

The States have complete power to establish and abolish offices at pleasure, except as restrained by their own consti-

tutions. *Butler v. Pennsylvania*, 10 How. 402, 416; *Warner v. People*, 2 Denio, 272; *Commonwealth v. Bacon*, 6 S. & R. 322; *Commonwealth v. Mann*, 5 W. & S. 418; *Conner v. New York*, 5 N. Y. 285; *Wilcox v. Rodman*, 46 Mo. 323; *Barker v. Pittsburg*, 4 Penn. St. 49; *Territory v. Pyle*, 1 Ore. 149; *Bryan v. Cattell*, 15 Iowa, 538; *State v. Douglass*, 26 Wis. 423. Compare *People v. Bull*, 46 N. Y. 57.

the promotion of the general interest; and, therefore, it must, from its very nature, remain subject to the legislative will, so always that private rights are not infringed or trespassed upon. (a)

§ 1394. But an attempt has been made to press this principle much further, and to exempt from the constitutional prohibition all charters, which, though granted to private persons, are in reality trusts for purposes and objects which may, in a certain sense, be deemed public and general. The first great case in which this doctrine became the subject of judicial examination and decision, was the case of *Dartmouth College*. The legislature of New Hampshire had, without the consent of the corporation, passed an act changing the organization of the original provincial charter of the college, and transferring all the rights, privileges, and franchises from the old charter trustees to new trustees appointed under the act. The constitutionality of the act was contested, and after solemn argument, it was deliberately held by the Supreme Court, that the provincial charter was a contract within the meaning of the Constitution, and that the amendatory act was utterly void as impairing the obligation of that charter. The college was deemed, like all other colleges of private foundation, to be a private eleemosynary institution, endowed by its charter, with a capacity to take property unconnected with the government. Its funds were bestowed upon the faith of the charter, and those funds consisted entirely of private donations. It is true that the uses were in some sense public; that is, for the general benefit, and not for the mere benefit of the corporators; but this did not make the corporation a public corporation. It was a private institution for general charity. It was not distinguishable in principle from a private donation, vested in private trustees, for a public charity, or for a particular purpose of beneficence. And the State itself, if it had bestowed funds upon a charity of the same nature, could not resume those funds. In short, the charter was deemed a contract, to which the government, and the donors, and the trustees of the corporation, were all parties. It was for a valuable consideration, for the security and disposition of property, which was intrusted to the corporation upon the faith of its terms; and the trustees

(a) See *Newton v. Mahoning*, 100 U. S. 548, established at a particular place, and that a State may remove the location money laid out accordingly. of a county seat after the same has been

acquired rights under it which could not be taken away; for they came to them clothed with trusts, which they were obliged to perform, and could not constitutionally disregard. The reasoning in the case, of which this is a very faint and imperfect outline, should receive a diligent perusal; and it is difficult to present it in an abridged form, without impairing its force or breaking its connection.¹ The doctrine is held to be equally applicable to grants of additional rights and privileges to an existing corporation, and to the original charter, by which a corporation is first brought into existence and established. As soon as the latter becomes organized and *in esse*, the charter becomes a contract with the corporators.² (a)

¹ Dartmouth College v. Woodward, 4 Wheat. R. 518, 624 *et seq.*; 1 Kent's Comm. Lect. 19, pp. 389 to 392.

² *Ibid.*

(a) See also *Planter's Bank v. Sharp*, 6 How. 301; *Trustees of Vincennes University v. Indiana*, 14 How. 268; *Piqua Bank v. Knoup*, 16 How. 369; *Hawthorne v. Calef*, 2 Wall. 10; *Binghamton v. Bridge Case*, 3 Wall. 51; and the cases in the State courts collected in Cooley, Const. Lim. 279 note.

The grant of a franchise, however, even though in terms made exclusive, will not prevent the legislature from exercising the right of eminent domain in respect thereto. Franchises, like every other thing of value, or in the nature of property, are subject to this right, and any of their incidents may be taken away, or the franchises themselves annihilated by means of its exercise. *West River Bridge Co. v. Dix*, 16 Vt. 446, and 6 How. 507; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40, 454; *Matter of Kerr*, 42 Barb. 119.

It is believed that the legislature does not possess the power to preclude itself from an exercise of the right of eminent domain by any form of contract. See what is said by Mr. Greenleaf on this subject in note to *Greenleaf's Cruise*, Vol. II. p. 67. Also *Redfield on Railways* (3d ed.) Vol. I. p. 258. If it has the power, the intent to exercise it will not be presumed

in any case. *People v. New York*, 32 Barb. 113; *Illinois Canal v. Chicago R. Co.*, 14 Ill. 321.

Some notice is proper here of reservations of the right of repealing or amending a charter. The following are the chief judicial authorities on the subject: *Spring Valley Waterworks v. Schottler*, 110 U. S. 347; *St. Anna Asylum v. New Orleans*, 105 U. S. 362; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Tucker v. Ferguson*, 22 Wall. 575; *New Jersey v. Yard*, 95 U. S. 104; *Shields v. Ohio*, Id. 319; *Atlantic R. Co. v. Georgia*, 98 U. S. 359; *Railroad Co. v. Gaines*, 97 U. S. 697; *Sinking Fund Cases*, 99 U. S. 718; *Railroad Co. v. Supervisors*, 93 U. S. 595; *Greenwood v. Union Freight Co.*, 105 U. S. 13; *Union Ry. Co. v. Philadelphia*, 101 U. S. 528; *Richmond R. Co. v. Richmond*, 96 U. S. 521; *Miller v. New York*, 15 Wall. 478; *Tomlinson v. Jessup*, Id. 454; *Pennsylvania College Cases*, 13 Wall. 190; *Pennsylvania R. Co. v. Duncau*, 111 Penn. St. 352. As to similar powers in regard to leases, see *Fox v. Cincinnati*, 104 U. S. 783. That a general law reserving the right of repeal or amendment qualifies a subsequent specific grant is in ordinary cases true; but the proposition is not to

§ 1395. It has not been thought any objection to this interpretation, that the preservation of charters, and other corporate rights, might not have been primarily, or even secondarily, within the contemplation of the framers of the Constitution, when this clause was introduced. It is probable that the other great evils, already alluded to, constituted the main inducement to insert it, where the temptations were more strong and the interest more immediate and striking, to induce a violation of contracts. But though the motive may thus have been to reach other more pressing mischiefs, the prohibition itself is made general. It is applicable to all contracts, and not confined to the forms then most known and most discussed. Although a rare or particular case may not of itself be of sufficient magnitude to induce the establishment of a constitutional rule, yet it must be governed by that rule, when established, unless some plain and strong reason for excluding it can be given. It is not sufficient

be taken absolutely. It may appear that the legislature intended to do and has done something not within the operation of the prior Act; and it is a general rule that *leges posteriores priores contrarias abrogant*. See the cases above cited of *Tomlinson v. Jessup*; *Miller v. New York*; *Shields v. Ohio*; *New Jersey v. Yard*; *Sinking Fund Cases*; and *Atlantic R. Co. v. Georgia*. And further see *Greenwood v. Freight Co.*, 105 U. S. 13; *Sinking Fund Cases*, 99 U. S. 718; *Flint Plank Road Co. v. Woodhull*, 25 Mich. 99; *Lothrop v. Stedman*, 41 Conn. 583; *Orr v. Backen*, 81 Ky. 593; *Commonwealth v. Pittsburgh R. Co.*, 58 Penn. St. 26; 2 Hare, Am. Const. Law, 655 *et seq.*

In the *Sinking Fund Cases*, *supra*, the court indeed said that the power of alteration, however plain, had beyond doubt its limits; it could not be used to take away property already acquired in virtue of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made. The court has also declared that the alterations must, if made, be reasonable (*Worcester v. Norwich R. Co.*, 109 Mass. 103, 118); they must be made in good faith, and they

must be consistent with the object and scope of the Act of incorporation. *Shields v. Ohio*, *supra*. It is equally clear that where the legislature has given an assurance intended to influence conduct and to bring about contracts, contracts thus effected are within the meaning of the Constitution, notwithstanding prior provisions of law giving to the legislature a power of repeal or amendment. *Asylum v. New Orleans*, 185 U. S. 362; *Miller v. New York*, *supra*; 2 Hare, 657.

If the reservation is in terms absolute, it appears to be for the legislature to determine, exclusively, the propriety of exercising the power, within, of course, the admitted limits. 2 Hare, 659; *Greenwood v. Freight Co.*, 105 U. S. 13; *Bridge Co. v. United States*, Id. 470; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Worcester v. Norwich R. Co.*, 109 Mass. 103, 118.

The power to alter includes the right not merely to take away powers granted, it includes the right to add powers entirely new; and stockholders cannot object to the carrying the same into execution, though this may involve large outlays. *Worcester v. Norwich R. Co.*, *supra*.

to show, that it may not have been foreseen, or intentionally provided for. To exclude it, it is necessary to go further, and show, that if the case had been suggested, the language of the convention would have been varied so as to exclude and except it. Where a case falls within the words of a rule or prohibition, it must be held within its operation, unless there is something obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, arising from such a construction.¹ No such absurdity, mischief, or repugnancy can be pretended in the present case. On the contrary, every reason of justice, convenience, and policy unite to prove the wisdom of embracing it in the prohibition. An impregnable barrier is thus thrown around all rights and franchises derived from the States, and solidity and inviolability are given to the literary, charitable, religious, and commercial institutions of the country.²

§ 1396. It has also been made a question, whether a compact between two States is within the scope of the prohibition. And this also has been decided in the affirmative.³ (a) The terms, "compact" and "contract," are synonymous; and, when propositions are offered by one State, and agreed to and accepted by another, they necessarily constitute a contract between them. There is no difference, in reason or in law, to distinguish between contracts made by a State with individuals, and contracts made between States. Each ought to be equally inviolable.⁴ Thus, where, upon the separation of Kentucky from Virginia, it was agreed by compact between them, that all private rights and interests in lands in Kentucky, derived from the laws of Virginia, should remain valid and secure under the laws of Kentucky, and should be determined by the laws then existing in Virginia, it was held by the Supreme Court, that certain laws of Kentucky (commonly called the occupying claimant laws), which varied and restricted the rights and remedies of the owners of such lands, were void, because they impaired the obligation of the

¹ *Dartmouth College v. Woodward*, 4 Wheat. R. 644, 645. See also *Sturgis v. Crowninshield*, 4 Wheat. R. 202.

² 1 Kent's Comm. Lect. 19, p. 392.

³ *Green v. Biddle*, 8 Wheat. R. 1; 1 Kent's Comm. Lect. 19, p. 393; *Sergeant on Constitution*, ch. 28 [ch. 30].

⁴ *Green v. Biddle*, 8 Wheat. R. 1, 92.

(a) See *Hawkins v. Barney*, 5 Pet. 457.

contract. Nothing, said the court, can be more clear upon principles of law and reason, than that a law, which denies to the owner of the land a remedy to secure the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged; but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.¹ But statutes of limitations, which are mere regulations of the remedy for the purposes of general repose and quieting titles, are not supposed to impair the right; but merely to provide for the prosecution of it within a reasonable period; and to deem the non-prosecution within the period an abandonment of it.²(a)

§ 1397. Whether a State legislature has authority to pass a law declaring a marriage void, or to award a divorce, has, incidentally, been made a question, but has never yet come directly in judgment. Marriage, though it be a civil institution, is understood to constitute a solemn, obligatory contract between the parties. And it has been, *arguendo*, denied, that a State legislature constitutionally possesses authority to dissolve that contract against the will, and without the default of either party.(b) This point, however, may well be left for more exact consideration, until it becomes the very ground of the *lis mota*.³(c)

¹ Green v. Biddle, 8 Wheat. R. 1, 75, 76.

² Hawkins v. Barney's Lessee, 5 Peters's Sup. R. 457; Bank of Hamilton v. Dudley's Lessee, 2 Peters's Sup. R. 492.

³ Dartmouth College v. Woodward, 4 Wheat. R. 629, 695, 696.

(a) *Supra*, § 1385, note.

(b) Such has been the view of the State courts in general. See Clark v. Clark, 10 N. H. 385; Maguire v. Maguire, 7 Dana, 183; Cronise v. Cronise, 54 Penn. St. 255; Carson v. Carson, 40 Miss. 349; Adams v. Palmer, 51 Me. 480.

Some courts, however, have insisted that the granting of a divorce was a

judicial power, and consequently could not be exercised by the legislature. See Bingham v. Miller, 17 Ohio, 445; Ponder v. Graham, 4 Fla. 23; State v. Fry, 4 Mo. 120; Bryson v. Campbell, 12 Mo. 498; Bryson v. Bryson, 17 Mo. 590; Clark v. Clark, 10 N. H. 380.

(c) It is now held that marriage is not a contract within the meaning of the federal

§ 1398. Before quitting this subject, it may be proper to remark, that, as the prohibition respecting *ex post facto* laws applies only to criminal cases, and the other is confined to impairing the obligation of contracts, there are many laws of a retrospective character, which may yet be constitutionally passed by the State legislatures, however unjust, oppressive, or impolitic they may be.¹ (a) Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.² Still they are, with the exceptions above stated, left open to the States, according to their own constitutions of government, and become obligatory if not prohibited by the latter. Thus, for instance, where the legislature of Connecticut, in 1795, passed a resolve setting aside a decree of a court of probate, disapproving of a will, and granted a new hearing; it was held that the resolve, not being against any constitutional principle in that State, was valid; and that the will, which was approved upon the new hearing, was conclusive as to the rights obtained under it.³ There is nothing in the Constitution of the United States which forbids a State legislature from exercising judicial functions; nor from divesting rights vested by law in an individual, provided its effect be not to impair the obligation of a contract.⁴ If such a law be void, it is upon principles derived from the general nature of free governments, and the necessary limitations created thereby, or from the State restrictions upon the legislative authority, and not from the prohibitions of the Constitution of the United States. If a State statute should, contrary to the general principles of law, declare that contracts founded upon an illegal or immoral consideration, or otherwise void, should nevertheless be valid, and binding between the parties; its retrospective char-

¹ *Ante*, § 1345. See *Beach v. Woodhull*, 1 Peters's Cir. Ct. R. 2; *Calder v. Bull*, 3 Dall. R. 386; *Satterlee v. Mathewson*, 2 Peters's Sup. R. 380; *Wilkinson v. Leland*, 2 Peters's Sup. R. 627, 661; *Watson v. Mercer*, 8 Peters's S. C. R. 110.

² *Patterson, J.*, in *Calder v. Bull*, 3 Dall. R. 397.

³ *Calder v. Bull*, 3 Dall. R. 386.

⁴ *Satterlee v. Mathewson*, 2 Peters's Sup. R. 380, 413; *Calder v. Bull*, 3 Dall. R. 386. See *Olney v. Arnold*, 3 Dall. R. 308; *Wilkinson v. Leland*, 2 Peters's Sup. R. 627.

Constitution. *Maynard v. Hill*, 125 U. S. 579; *Bridge*, 11 Pet. 420, 539; *Crawford v. Branch Bank of Mobile*, 7 How. 279; 190.

(a) *Charles River Bridge v. Warren* *Auffmordt v. Rasin*, 102 U. S. 620.

acter could not be denied, for the effect would be to create a contract between the parties, where none had previously existed. Yet it would not be reached by the Constitution of the United States; for to create a contract, and to impair or destroy one, can never be construed to mean the same thing. It may be within the same mischief, and equally unjust and ruinous; but it does not fall within the terms of the prohibition.¹ So if a State court should decide that the relation of landlord and tenant did not legally subsist between certain persons, and the legislature should pass a declaratory act, declaring that it did subsist; the act, so far as the Constitution of the United States is concerned, would be valid.² So if a State legislature should confirm a void sale; if it did not divest the settled rights of property it would be valid.³ (a) Nor, as has been already seen, would a State law, discharging a party from imprisonment under a judgment upon a contract though passed subsequently to the imprisonment be an unconstitutional exercise of power; for it would leave the obligation of the contract undisturbed. The States still possess the rightful authority to abolish imprisonment for debt, and may apply it to present as well as to future imprisonment.⁴

§ 1399. Whether, indeed, independently of the Constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American revolution, no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A. and transfer it to B. by a mere legislative act.⁵ That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The

¹ *Satterlee v. Mathewson*, 2 Peters's Sup. R. 380, 412, 413.

² *Satterlee v. Mathewson*, 2 Peters's Sup. R. 380, 412, 413.

³ *Wilkinson v. Leland*, 2 Peters's Sup. R. 627, 661.

⁴ *Mason v. Haile*, 2 Peters's Sup. R. 870.

⁵ *Fletcher v. Peck*, 6 Cranch, 67, 134.

(a) See *Goshen v. Stonington*, 4 Conn. 224; *Hepburn v. Curtis*, 7 Watts, 300; *State v. Newark*, 3 Dutch. 185; *Lewis v. McElvain*, 16 Ohio, 847; *Andrews v. Russel*, 7 Blackf. 474; *Parmelee v. Law-*

rence, 48 Ill. 331; *Thompson v. Morgan*, 6 Minn. 262; and numerous cases cited in *Cooley*, Const. Lim. 371 to 378, and *Potter's Dwarries on Statutes*, ch. xv.

fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that any State legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and positive declarations to that effect.¹ (a)

§ 1400. The remaining prohibition in this clause is, that no State shall "grant any title of nobility." The reason of this prohibition is the same as that upon which the like prohibition to the government of the nation is founded. Indeed, it would be almost absurd to provide sedulously against such a power in the latter, if the States were still left free to exercise it. It has been emphatically said, that this is the corner-stone of a republican government; for there can be little danger, while a nobility is excluded, that the government will ever cease to be that of the people.²

¹ *Wilkinson v. Leland*, 2 Peters's Sup. R. 627, 657. See also *Satterlee v. Mathewson*, 2 Peters's Sup. R. 380, 413, 414; *Fletcher v. Peck*, 6 Cranch, 67, 134; *Terrett v. Taylor*, 9 Cranch, 52; *Town of Pawlett v. Clark*, 9 Cranch, 535. See also *Sergeant on Const.* ch. 28 [ch. 30].

² *The Federalist*, No. 84.

(a) See this subject examined at length in *Cooley*, *Const. Lim.* 358 to 383. See also *Potter's Dwarries on Statutes*, ch. xv.

Those things which the States are forbidden to do by law, they cannot accomplish by provisions of their constitutions. *Jefferson Branch Bank v. Skelley*, 1

Black, 436; *Cummings v. Missouri*, 4 Wall. 277; *Railroad Co. v. McClure*, 10 Wall. 511; *White v. Hart*, 13 Wall. 649; *Union Bank v. State*, 9 Yerg. 490; *State v. Keith*, 63 N. C. 140; *Jackoway v. Denton*, 25 Ark. 625; *Gardner v. Stevens*, 1 Heisk. 280.

CHAPTER XXXV.

PROHIBITIONS ON THE STATES.

§ 1401. THE next clause of the Constitution is, "No State shall, without the consent of Congress, lay any duty on tonnage; keep troops or ships of war in time of peace; enter into any agreement or compact with another State, or with a foreign power; or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

§ 1402. The first part of this clause, respecting laying a duty on tonnage, has been already considered. The remaining clauses have their origin in the same general policy and reasoning which forbid any State from entering into any treaty, alliance, or confederation; and from granting letters of marque and reprisal. In regard to treaties, alliances, and confederations, they are wholly prohibited. But a State may, *with the consent of Congress*, enter into an agreement or compact with another State or with a foreign power. What precise distinction is here intended to be taken between *treaties*, and *agreements*, and *compacts*, is nowhere explained, and has never as yet been subjected to any exact judicial or other examination. A learned commentator, however, supposes, that the former ordinarily relate to subjects of great national magnitude and importance, and are often perpetual, or for a great length of time; but that the latter relate to transitory or local concerns, or such as cannot possibly affect any other interests but those of the parties.¹ But this is at best a very loose and unsatisfactory exposition, leaving the whole matter open to the most latitudinarian construction. What are subjects of great national magnitude and importance? Why may not a compact or agreement between States be perpetual? If it may not, what shall be its duration? Are not treaties often made for short periods, and upon questions of local interest, and for temporary objects?²

¹ 1 Tuck. Black. Comm. App. 310.

² The corresponding article of the confederation did not present exactly the same embarrassments in its construction. One clause was, "No State, without the consent

§ 1403. Perhaps the language of the former clause may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground, that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.¹ The latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other. Such compacts have been made since the adoption of the Constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts, settling the boundaries between States, are, or may be, of the same character. In such cases, the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief. (a)

of the United States, in Congress assembled, shall enter into any conference, agreement, alliance, or treaty with any king, prince, or state;" and "No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, &c.; specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." Taking both clauses, it is manifest that the former refers exclusively to foreign states or nations, and the latter to the States of the Union.

¹ In this view, one might be almost tempted to conjecture that the original reading was "treaties of alliance or confederation," if the corresponding article of the confederation (art. 6) did not repel it.

(a) As to the meaning of these terms, see *Holmes v. Jennison*, 14 Pet. 572 to 574. In entering into compacts or agreements, the States act in their sovereign capacity, and bind their citizens. "The compact is a law to the sovereigns who entered into it, and it is equally a law to

their citizens. It regulates the rights and remedies of all who are affected by it." *Fleeger v. Pool*, 1 McLean, 191. See also *Bennett v. Boggs*, Baldw. 60; *Spooner v. McConnell*, 1 McLean, 337; *Green v. Biddle*, 8 Wheat. 1.

The consent required of Congress to

§ 1404. The other prohibitions in the clause respect the power of making war, which is appropriately confided to the national government.¹ The setting on foot of an army or navy by a State in times of peace might be a cause of jealousy between neighboring States and provoke the hostilities of foreign bordering nations. In other cases, as the protection of the whole Union is confided to the national arm and the national power, it is not fit that any State should possess military means to overawe the Union, or to endanger the general safety. Still a State may be so situated that it may become indispensable to possess military forces to resist an expected invasion or insurrection. The danger may be too imminent for delay; and under such circumstances a State will have a right to raise troops for its own safety, even without the consent of Congress. After war is once begun there is no doubt that a State may, and indeed it ought to possess the power to raise forces for its own defence; and its co-operation with the national forces may often be of great importance, to secure success and vigor in the operations of war. The prohibition is, therefore, wisely guarded by exceptions sufficient for the safety of the States, and not justly open to the objection of being dangerous to the Union.

§ 1405. In what manner the consent of Congress is to be given to such acts of the States is not positively provided for. Where an express consent is given, no possible doubt can arise. But the consent of Congress may also be implied; and, indeed, is always to be implied, when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them. Thus, where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part; there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. This was true as to the compact between Virginia and

¹ There were corresponding prohibitions in the confederation (art. 6), which differ more in form than in substance from those in the Constitution. No State was at liberty, in time of peace, to keep up vessels of war, or land-forces, without the consent of Congress. Nor was any State at liberty to engage in war without the consent of Congress unless invaded, or in imminent danger thereof.

agreements between States, need not be by an express assent to every proposition thereof; but may be inferred from the legislation of Congress on the subject. *Virginia v. West Virginia*, 11 Wall. 39.

Kentucky, upon the admission of the latter into the Union;¹ (a) and the like rule will apply to other States, such as Maine, more recently admitted into the Union.

§ 1406. We have thus passed through the positive prohibitions introduced upon the powers of the States. It will be observed, that they divide themselves into two classes; those which are political in their character, as an exercise of sovereignty; and those which more especially regard the private rights of individuals.² In the latter, the prohibition is absolute and universal. In the former, it is sometimes absolute and sometimes subjected to the consent of Congress. It will at once be perceived how full of difficulty and delicacy the task was to reconcile the jealous tenacity of the States over their own sovereignty, with the permanent security of the national government and the inviolability of private rights. The task has been accomplished with eminent success. If everything has not been accomplished which a wise forecast might have deemed proper for the preservation of our national rights and liberties, in all political events, much has been done to guard us against the most obvious evils, and to secure a wholesome administration of private justice. To have attempted more would probably have endangered the whole fabric, and thus have perpetuated the dominion of misrule and imbecility.

§ 1407. It has been already seen, and it will hereafter more fully appear, that there are implied as well as express prohibitions in the Constitution upon the power of the States. Among the former, one clearly is that no State can control, or abridge, or interfere with the exercise of any authority under the national government.³ And it may be added, that State laws—as, for instance, State statutes of limitations and State insolvent laws—have no operation upon the rights or contracts of the United States.⁴

§ 1408. And here end our commentaries upon the first article of the Constitution, embracing the organization and powers of the

¹ *Green v. Biddle*, 8 Wheat. R. 1, 85, 86, 87.

² See *Ogden v. Saunders*, 12 Wheat. R. 334, 335.

³ 1 Kent's Comm. Lect. 19, p. 382.

⁴ *United States v. Wilson*, 8 Wheat. R. 253; *United States v. Hoar*, 2 Mason, R. 311.

(a) See *Virginia v. West Virginia*, 11 Wall. 39, in which it was decided that the consent of Congress, though not expressly given, might be implied from its legislation on the subject.

legislative department of the government, and the prohibitions upon the State and national governments. If we here pause but for a moment, we cannot but be struck with the reflection, how admirably this division and distribution of legislative powers between the State and national governments are adapted to preserve the liberty and promote the happiness of the people of the United States. To the general government are assigned all those powers which relate to the common interests of all the States, as comprising one confederated nation. While to each State is reserved all those powers which may affect or promote its own domestic interests, its peace, its prosperity, its policy, and its local institutions; at the same time, such limitations and restraints are imposed upon each government as experience has demonstrated to be wise, to control any public functionaries, or as are indispensable to secure the harmonious operations of the Union.¹

§ 1409. A clause was originally proposed, and carried in the convention, to give the national legislature a negative upon all laws passed by the States, contravening, in the opinion of the national legislature, the articles of the Union, and treaties subsisting under its authority. This proposition was, however, afterwards negatived, and finally abandoned.² A more acceptable substitute was found in the article (hereafter to be examined) which declares that the Constitution, laws, and treaties of the United States shall be the supreme law of the land.

¹ 1 Tuck. Black. Comm. App. 314.

² Journal of Convention, 68, 86, 87, 104, 107, 136, 183, 283. North American Review, October, 1827, pp. 264, 266; 2 Pitkin's History, 261. This seems to have been a favorite opinion of Mr. Madison, as well as of some other distinguished statesmen. North American Review, October, 1827, pp. 264, 265, 266; 2 Pitkin's History, 251, 259.

CHAPTER XXXVI.

EXECUTIVE DEPARTMENT—ORGANIZATION OF.

§ 1410. IN the progress of our examination of the Constitution, we are now arrived at the second article, which contains an enumeration of the organization and powers of the executive department. What is the best constitution for the executive department, and what are the powers with which it should be entrusted, are problems among the most important, and probably the most difficult to be satisfactorily solved, of all which are involved in the theory of free governments.¹ No man, who has ever studied the subject with profound attention, has risen from the labor without an increased and almost overwhelming sense of its intricate relations and perplexing doubts. No man, who has ever deeply read the human history, and especially the history of republics, but has been struck with the consciousness how little has been hitherto done to establish a safe depository of power in any hands; and how often, in the hands of one, or a few, or many, of an hereditary monarch or an elective chief, the executive power has brought ruin upon the state, or sunk under the oppressive burden of its own imbecility. Perhaps our own history, hitherto, does not establish that we have wholly escaped all the dangers, and that here is not to be found, as has been the case in other nations, the vulnerable part of the republic.

§ 1411. It appears that the subject underwent a very elaborate discussion in the convention, with much diversity of opinion; and various propositions were submitted of the most opposite character. The Federalist has remarked, that there is hardly any part of the system, the arrangement of which could have been attended with great difficulty, and none which has been inveighed against with less candor or criticised with less judgment.²

¹ See 2 Elliot's Deb. 358; 1 Kent's Comm. Lect. 13, pp. 255, 256.

² The Federalist, No. 67.

§ 1412. The first clause of the first section of the second article is as follows: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years; and, together with the Vice-President, chosen for the same term, be chosen as follows."

§ 1413. Under the confederation there was no national executive. The whole powers of the national government were vested in a Congress, consisting of a single body; and that body was authorized to appoint a committee of the States, composed of one delegate from every State, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine States, as nine States should consent to.¹ This want of a national executive was deemed a fatal defect in the confederation.

§ 1414. In the convention, there does not seem to have been any objection to the establishment of a national executive. But upon the question, whether it should consist of a single person, the affirmative was carried by a vote of seven States against three.² (a) The term of service was at first fixed at seven years, by a vote of five States against four, one being divided. The term was afterwards altered to four years, upon the report of a committee, and adopted by the vote of ten States against one.³

§ 1415. In considering this clause, three practical questions are naturally suggested: First, whether there should be a distinct executive department; secondly, whether it should be composed of more than one person; and, thirdly, what should be the duration of office.

§ 1416. Upon the first question, little need be said. All America have at length concurred in the propriety of establishing a distinct executive department. The principle is embraced in every State constitution; and it seems now to be assumed among us, as a fundamental maxim of government, that the legislative, executive, and judicial departments ought to be separate, and the powers of one ought not to be exercised by either of the others. The same maxim is found recognized in express

¹ Confederation, Art. 9, 10.

² Journ. of Convention, 68, 89, 96, 136.

³ Journal of Convention, 90, 136, 211, 225, 324, 332, 333; 2 Pitkin's Hist. 252.

(a) Mr. Calhoun advocated a dual executive, as essential to the protection of his section of the country, if not to the perpetuity of our institutions. Discourse on the Constitution, &c., Works, I. 393.

terms in many of our State constitutions. It is hardly necessary to repeat, that where all these powers are united in the same hands, there is a real despotism, to the extent of their coercive exercise. Where, on the other hand, they exist together, and yet depend for their exercise upon the mere authority of recommendation (as they did under the confederation),¹ they become at once imbecile and arbitrary, subservient to popular clamor, and incapable of steady action. The harshness of the measures in relation to paper-money, and the timidity and vacillation in relation to military affairs, are examples not easily to be forgotten.

§ 1417. Taking it, then, for granted, that there ought to be an executive department, the next consideration is, how it ought to be organized. It may be stated in general terms, that that organization is best which will at once secure energy in the executive and safety to the people. The notion, however, is not uncommon, and occasionally finds ingenious advocates, that a vigorous executive is inconsistent with the genius of a republican government.² It is difficult to find any sufficient grounds on which to rest this notion; and those which are usually stated belong principally to that class of minds which readily indulge in the belief of the general perfection, as well as perfectibility, of human nature, and deem the least possible quantity of power with which government can subsist to be the best. To those who look abroad into the world, and attentively read the history of other nations, ancient and modern, far different lessons are taught with a severe truth and force. Those lessons instruct them, that energy in the executive is a leading character in the definition of a good government.³ It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws, to the protection of

¹ See 1 Jefferson's Corresp. 68.

² See 2 American Museum, 427. Milton was of this opinion; and triumphantly states, that "all ingenious and knowing men will easily agree with me, that a free commonwealth, without a single person or House of Lords, is by far the best government, if it can be had." Milton on the Ready and Easy Way to establish a Free Commonwealth. His notion was, that the whole power of the government should centre in a House of Commons. Locke was in favor of a concentration of the whole executive and legislative powers in a small assembly; and Hume thought the executive powers safely lodged with a hundred senators. Hume's Essays, Vol. I., Essay 16, p. 526. Mr. Chancellor Kent has made some just reflections upon these extraordinary opinions, in 1 Kent's Comm. Lect. 13, p. 264.

³ 1 Kent's Comm. Lect. 13, pp. 253, 254; Rawle on Const. ch. 12, pp. 147, 148.

property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice, and to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.¹ Every man the least conversant with Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable name of a dictator, as well against the intrigues of ambitious individuals, aspiring to tyranny, and the seditions of whole classes of the community, threatening the existence of the government, as against foreign enemies, menacing the destruction and conquest of the State.² A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever may be its theory, must, in practice, be a bad government.³

§ 1418. The ingredients which constitute energy in the executive are unity, duration, an adequate provision for its support, and competent powers. The ingredients which constitute safety in a republican form of government are a due dependence on the people, and a due responsibility to the people.⁴

§ 1419. The most distinguished statesmen have uniformly maintained the doctrine, that there ought to be a single executive, and a numerous legislature. They have considered energy as the most necessary qualification of the power, and this as best attained by reposing the power in a single hand. At the same time they have considered, with equal propriety, that a numerous legislature was best adapted to the duties of legislation, and best calculated to conciliate the confidence of the people, and to secure their privileges and interests.⁵ Montesquieu has said, that “the executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many. On the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person. But if there were no monarch, and the executive power should be committed to a certain number of persons, selected from the legislative body,

¹ The Federalist, No. 70 ; Rawle on Const. ch. 12, p. 149.

² Ibid.

³ Ibid.

⁴ Ibid. ; 1 Kent's Comm. Lect. 13, pp. 253, 254.

⁵ The Federalist, No. 70.

there would be an end to liberty; by reason that the two powers would be united, as the same persons would sometimes possess, and would always be able to possess, a share in both.”¹ De Lolme, in addition to other advantages, considers the unity of the executive as important in a free government, because it is thus more easily restrained.² “In those states,” says he, “where the execution of the laws is entrusted to several different hands, and to each with different titles and prerogatives, such division, and such changeableness of measures, which must be the consequence of it, constantly hide the true cause of the evils of the state. Sometimes military tribunes, and at others consuls, bear an absolute sway. Sometimes patricians usurp everything; and at other times those who are called nobles. Sometimes the people are oppressed by decemvirs; and at others by dictators. Tyranny in such states does not always beat down the fences that are set around it; but it leaps over them. When men think it confined to one place, it starts up again in another. It mocks the efforts of the people, not because it is invincible, but because it is unknown. But the indivisibility of the public power in England has constantly kept the views and efforts of the people directed to one and the same object.”³ He adds, in another place, “We must observe a difference between the legislative and executive powers. The latter may be confined, and even is the more easily so, when undivided. The legislature, on the contrary, in order to its being restrained, should absolutely be divided.”⁴

§ 1420. That unity is conducive to energy will scarcely be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of a greater number; and in proportion as the number is increased, these qualities will be diminished.⁵

§ 1421. This unity may be destroyed in two ways: first, by vesting the power in two or more magistrates of equal dignity; secondly, by vesting it ostensibly in one man, subject, however,

¹ Montesquieu's *Spirit of Laws*, B. 11, ch. 6.

² De Lolme on *Const. of England*, B. 2, ch. 2.

³ *Ibid.*

⁴ *Ibid.* See also *The Federalist*, No. 70; 1 Kent's *Comm. Lect.* 13, pp. 253 to 255. The celebrated Junius (the great unknown) has pronounced De Lolme's work to be at once “deep, solid, and ingenious.”

⁵ *The Federalist*, No. 70; 1 Kent's *Comm. Lect.* 13, pp. 253, 254.

in whole or in part, to the control and advice of a council. Of the first, the two consuls of Rome may serve as an example in ancient times; and in modern times, the brief and hasty history of the three consuls of France, during its short-lived republic.¹ Of the latter, several States in the Union furnish examples, as some of the colonies did before the revolution. Both these methods of destroying the unity of the executive have had their advocates. They are both liable to similar, if not to equal, objections.²

§ 1422. The experience of other nations, so far as it goes, coincides with what theory would point out. The Roman history records many instances of mischiefs to the republic from dissensions between the consuls, and between the military tribunes who were at times substituted instead of the consuls. Those dissensions would have been even more striking, as well as more frequent, if it had not been for the peculiar circumstances of that republic, which often induced the consuls to divide the administration of the government between them. And as the consuls were generally chosen from the patrician order, which was engaged in perpetual struggles with the plebeians for the preservation of the privileges and dignities of their own order, there was an external pressure, which compelled them to act together for mutual support and defence.³

§ 1423. But, independent of any of the lights derived from history, it is obvious that a division of the executive power between two or more persons must always tend to produce dissensions and fluctuating counsels. Whenever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust, or office, in which they are clothed with equal dignity and authority, there are peculiar dangers arising from personal emulation or personal animosity; from superior talents on one side, encountering strong jealousies on the other; from pride of opinion on one side, and weak devotion to popular prejudices on the other; from the vanity of being the author of a plan, or resentment from some imagined slight by the approval of that of another.

¹ 4 Jefferson's Corresp. 160, 161. Propositions were made in the convention for an executive composed of a plurality of persons. Journal of Convention, 124. They came from that party in the convention which was understood to be favorable to a continuation of the confederation with amendments. Ibid. 123.

² The Federalist, No. 70.

³ Ibid.

From these, and other causes of the like nature, the most bitter rivalries and dissensions often spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide. The wisest measures are thus often defeated, or delayed, even in the most critical moments. And, what constitutes even a greater evil, the community often becomes split up into rival factions, adhering to the different persons who compose the magistracy; and temporary animosities become thus the foundation of permanent calamities to the State.¹ Indeed, the ruinous effect of rival factions in free states, struggling for power, has been the constant theme of reproach by the admirers of monarchy, and of regret by the lovers of republics. The Guelphs and the Ghibellines, the white and the black factions, have been immortalized in the history of the Italian states; and they are but an epitome of the same unvarying scenes in all other republics.²

§ 1424. From the very nature of a free government, inconveniences resulting from a division of power must be submitted to, in the formation of the legislature. But it is unwise, as well as unnecessary, in the constitution of the executive. In the legislature promptitude of decision is not of great importance. It is more often an evil than a benefit. Differences of opinion in that department may, indeed, sometimes retard salutary measures; but they often lead to more circumspection and deliberation, and to more perfection and accuracy in the laws. A resolution, once passed by a legislative body, becomes a law; and opposition to it is either illegal or impolitic. Before it becomes a law, opposition may diminish the mischiefs, or increase the good of the measure. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. The evils are here pure and unmixed. They embarrass and weaken every plan to which they relate, from the first step to the final conclusion. They constantly counteract the most important ingredients in the executive character,—vigor, expedition, and certainty of operation. In peace, distraction of the executive councils is sufficiently alarming and mischievous. But in war, it prostrates all energy and all security. It brings triumph to the enemy, and disgrace to the country.³

¹ The Federalist, No. 70.

² De Lolme on Const. B. 2, ch. 1.

³ The Federalist, No. 70. The learned commentator on Blackstone's Commentaries

§ 1425. Objections of a like nature apply, though in some respects with diminished force, to the scheme of an executive council, whose constitutional concurrence is rendered indispensable. An artful cabal in that council would be able to distract and enervate the whole public councils. And even without such a cabal, the mere diversity of views and opinions would almost always mark the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness, or a degrading inconsistency.¹ But an objection in a republic government quite as weighty is, that such a participation in the executive power has a direct tendency to conceal faults and destroy responsibility. Responsibility is of two kinds,—to censure and to punishment. The first is the more important of the two, especially in an elective government. Men in public trust will more often act in such a manner as to render themselves unworthy of public favor than to render themselves liable to legal punishment. But the multiplication of voices in the business of the executive renders it difficult to fix responsibility of either kind; for it is perpetually shifted from one to another. It often becomes impossible, amidst mutual accusations, to determine upon whom the blame ought to rest.² A sense of mutual impropriety sometimes induces the parties to resort to plausible pretexts to disguise their misconduct; or a dread of public responsibility to cover up, under the lead of some popular demagogue, their own faults and vacillations. Thus, a council often becomes the means, either of shifting off all effective responsibility from the chief magistrate, or of intrigues and oppositions, which destroy his power and sup-

was of opinion that an executive composed of a single delegate of each State, like the "committee of Congress" under the confederation, would have been better than a single chief magistrate for the Union. If such a scheme had prevailed, we should have had at this time an executive magistracy of twenty-four persons. See 1 Tuck. Black. Comm. App. 349, 350. Surely the experience of the country, under the confederation, must have been wholly forgotten, when this scheme approved itself to the judgment of the proposer. Mr. Jefferson has told us in an emphatic manner, that the "committee of Congress immediately fell into schisms and dissensions, which became at length so inveterate as to render all co-operation among them impracticable. They dissolved themselves, abandoning the helm of government, and it continued without a head until Congress met in the ensuing winter. This was then imputed to the temper of two or three individuals. *But the wise ascribed it to the nature of man.*" 4 Jefferson's Corresp. 161.

¹ The Federalist, No. 70.

² The Federalist, No. 70; 3 Elliot's Deb. 99, 100, 103; Id. 272; 1 Kent's Comm. Lect. 13, pp. 253, 254.

plant his influence. The constant excuse for want of decision and public spirit on his part, will be, that he has been overruled by his council; and on theirs, that he would not listen to sound advice, or resisted a cordial co-operation. In regard to the ordinary operations of government, the general result is to introduce a system of bargaining and management into the executive councils; and an equally mischievous system of corruption and intrigue in the choice and appointment of counsellors. Offices are bestowed on unworthy persons to gratify a leading member, or mutual concessions are made to cool opposition and disarm enmity. It is but too true, that, in those States where executive councils exist, the chief magistrate either sinks into comparative insignificance, or sustains his power by arrangements neither honorable to himself nor salutary to the people. He is sometimes compelled to follow when he ought to lead; and he is sometimes censured for acts over which he has no control, and for appointments to office which have been wrung from him by a sort of political necessity.¹

§ 1426. The proper conclusion to be drawn from these considerations is, that plurality in the executive deprives the people of the two greatest securities for the faithful exercise of delegated power. First, it removes the just restraints of public opinion; and, secondly, it diminishes the means as well as the power of fixing responsibility for bad measures upon the real authors.²

§ 1427. The case of the king of Great Britain is adduced, as a proof the other way; but it is a case wholly inapplicable to the circumstances of our republic. In Great Britain there is an hereditary magistrate; and it is a settled maxim in that government that he can do no wrong; the true meaning of which is, that, for the sake of the public peace, he shall not be accountable for his administration of public affairs, and his person shall be sacred. In that kingdom it is, therefore, wise that he should have a constitutional council, at once to advise him in regard to measures, and to become responsible for those measures. In no other way could any responsibility be brought home to the executive department. Still the king is not bound by the advice of his council. He is the absolute master of his own conduct; and

¹ The Federalist, No. 70.

² The Federalist, No. 70; 1 Kent's Comm. Lect. 13, pp. 253, 254; 1 Tuck. Black. Comm. App. 318, 319; 3 Elliot's Deb. 99, 100.

the only alternative left to the ministry is, to compel him to follow their advice, or to resign the administration of the government. In the American republic the case is wholly different. The executive magistrate is chosen by, and made responsible to the people; and, therefore, it is most fit that he should have the exclusive management of the affairs for which he is thus made responsible. In short, the reason for a council in Great Britain is the very reason for rejecting it in America. The object, in each case, is to secure executive energy and responsibility. In Great Britain it is secured by a council. In America it would be defeated by one.¹

§ 1428. The idea of a council to the executive, which has prevailed to so great an extent in the State constitutions, has, without doubt, been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. It is a misapplication of a known rule, that in the multitude of counsel there is safety. If it were even admitted that the maxim is justly applicable to the executive magistracy, there are disadvantages on the other side which greatly overbalance it. But, in truth, all multiplication of the executive is rather dangerous than friendly to liberty; and it is more safe to have a single object for the jealousy and watchfulness of the people, than many.² It is in the highest degree probable, that the peculiar situation in which the American States were placed antecedently to the Revolution with colonial governors placed over them by the crown, and irresponsible to themselves, gave a sanction to the opinion of the value of an executive council, and of the dangers of a single magistrate, wholly disproportionate to its importance, and inconsistent with the permanent safety and dignity of an elective republic.³

§ 1429. Upon the question, whether the executive should be composed of a single person, we have already seen that there was, at first, a division of opinion in the convention which

¹ The Federalist, No. 70. See Rawle on Const. ch. 12, pp. 147 to 150; North Amer. Review, Oct. 1827, pp. 264, 265.

² The Federalist, No. 70; 1 Kent's Comm. Lect. 13, pp. 253, 254; 3 Elliot's Debates, 99, 100.

³ Mr. Chancellor Kent has, in his Commentaries, condensed the whole pith of the argument into two paragraphs of great brevity and clearness. 1 Kent's Comm. Lect. 13, pp. 253, 254. See also Rawle on Const. ch. 12, p. 147, &c. 1 Tuck. Black. Comm. App. 316 to 318.

framed the Constitution, seven States voting in the affirmative, and three in the negative; ultimately, however, the vote was unanimous in its favor.¹ But the project of an executive council was not so easily dismissed. It was renewed at different periods in various forms; and seems to have been finally, though indirectly, disposed of by the vote of eight States against three.² The reasoning which led to this conclusion is understood to have been that which has been already stated, and which is most elaborately expounded in the *Federalist*.³

§ 1430. The question as to the unity of the executive being disposed of, the next consideration is, as to the proper duration of his term of office. It has been already mentioned, that duration in office constitutes an essential requisite to the energy of the executive department. This has relation to two objects: first, the personal firmness of the chief magistrate in the employment of his constitutional powers; and, secondly, the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it is evident, that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. A man will naturally be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it. He will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a title durable or certain; and of course he will be willing to risk more for the one than for the other. This remark is not less applicable to political privilege, or honor, or trust, than to any article of ordinary property. A chief magistrate, acting under the consciousness that in a very short time he must lay down office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity from an independent exercise of his powers, or from those ill humors which are apt at times to prevail in all governments. If the case should be that he should, notwithstanding, be re-eligible, his wishes, if he should have any for office, would combine with his fears to debase his fortitude, or weaken his integrity, or enhance his irresolution.⁴

¹ Journal of Convention, 95, 96; *Id.* 183.

² Journ. of Convention, 69, 104, 265, 278, 340, 341. See also 2 *Amer. Museum*, 435, 534, 537.

³ The *Federalist*, No. 70; 3 *Elliot's Deb.* 100.

⁴ The *Federalist*, No. 71.

§ 1431. There are some, perhaps, who may be inclined to regard a servile pliancy of the executive to a prevalent faction or opinion in the community, or in the legislature, as its best recommendation. But such notions betray a very imperfect knowledge of the true ends and objects of government. While republican principles demand that the deliberate sense of the community should govern the conduct of those who administer their affairs, it cannot escape observation, that transient impulses and sudden excitements, caused by artful and designing men, often lead the people astray, and require their rulers not to yield up their permanent interests to any delusions of this sort. It is a just observation, that the people commonly intend the public good. But no one but a deceiver will pretend that they do not often err as to the best means of promoting it. Indeed, beset as they are by the wiles of sycophants, the snares of the ambitious and the avaricious, and the artifices of those who possess their confidence more than they deserve, or seek to possess it by artful appeals to their prejudices, the wonder rather is that their errors are not more numerous and more mischievous. It is the duty of their rulers to resist such bad designs at all hazards; and it has not unfrequently happened, that by such resistance they have saved the people from fatal mistakes, and, in their moments of cooler reflection, obtained their gratitude and their reverence.¹ But how can resistance be expected, when the tenure of office is so short as to make it ineffectual and insecure?

§ 1432. The same considerations apply with increased force to the legislature. If the executive department were to be subservient to the wishes of the legislature, at all times and under all circumstances, the whole objects of a partition of the powers of government would be defeated. To what purpose would it be to separate the executive and judiciary from the legislature, if both are to be so constituted as to be at the absolute devotion of the latter? It is one thing to be subordinate to the laws, and quite a different thing to be dependent upon the legislative body. The first comports with, the last violates the fundamental principles of, good government; and, in fact, whatever may be the form of the Constitution, the last unites all power in the same hands. The tendency of the legislative authority to absorb every other has been already insisted on at large in the preceding part of

¹ The Federalist, No. 71.

these commentaries, and need not here be further illustrated. In governments purely republican it has been seen that this tendency is almost irresistible. The representatives of the people are but too apt to imagine that they are the people themselves; and they betray strong symptoms of impatience and even disgust at the least resistance from any other quarter. They seem to think the exercise of its proper rights, by the executive or the judiciary, to be a breach of their privileges and an impeachment of their wisdom.¹ (a) If, therefore, the executive is to constitute an effective, independent branch of the government, it is indispensable to give it some permanence of duration in office, and some motive for a firm exercise of its powers.

§ 1433. The other ground, that of stability in the system of administration, is still more strikingly connected with duration in office. Few men will be found willing to commit themselves to a course of policy whose wisdom may be perfectly clear to themselves, if they cannot be permitted to complete what they have begun. Of what consequence will it be to form the best plans of executive administration, if they are perpetually passing into new hands before they are matured, or may be defeated at the moment when their reasonableness and their value cannot be understood or realized by the public? One of the truest rewards to patriots and statesmen is the consciousness that the objections raised against their measures will disappear upon a fair trial; and that the gratitude and affection of the people will follow their labors, long after they have ceased to be actors upon the public scenes. But who will plant when he can never reap? Who will sacrifice his present ease, and reputation, and popularity, and encounter obloquy and persecution, for systems which he can neither mould so as to insure success, nor direct so as to justify the experiment?

§ 1434. The natural result of a change of the head of the government will be a change in the course of administration, as well as a change in the subordinate persons who are to act as minis-

¹ The Federalist, No. 71; Id. No. 73; Id. No. 51. Mr. Jefferson says, "The executive in our governments is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislature is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period." 2 Jefferson's Corresp. 443.

(a) See Life of Gouverneur Morris, III. 251, 323.

ters to the executive. A successor in office will feel little sympathy with the plans of his predecessor. To undo what has been done by the latter will be supposed to give proofs of his own capacity; and will recommend him to all those who were adversaries of the past administration, and perhaps will constitute the main grounds of elevating him to office. Personal pride, party principles, and an ambition for public distinction, will thus naturally prompt to an abandonment of old schemes, and combine, with that love of novelty so congenial to all free states, to make every new administration the founders of new systems of government.¹

§ 1435. What should be the proper duration of office is matter of more doubt and speculation. On the one hand, it may be said that the shorter the period of office the more security there will be against any dangerous abuse of power. The longer the period the less will responsibility be felt, and the more personal ambition will be indulged. On the other hand, the considerations above stated prove that a very short period is, practically speaking, equivalent to a surrender of the executive power as a check in government, or subjects it to an intolerable vacillation and imbecility. In the convention itself much diversity of opinion existed on this subject. It was at one time proposed that the executive should be chosen during good behavior. But this proposition received little favor, and seems to have been abandoned without much effort.²

§ 1436. Another proposition was, as has been seen, to choose the executive for seven years, which at first passed by a bare majority;³ but, being coupled with a clause, "to be chosen by the national legislature," it was approved by the vote of eight States against two.⁴ Another clause, "to be ineligible a second time," was added by the vote of eight States against one, one being

¹ The Federalist, No. 72.

² This plan, whatever may now be thought of its value, was at the time supported by some of the purest patriots. Mr. Hamilton, Mr. Madison, and Mr. Jay were among the number. North American Review, Oct. 1827, pp. 263, 264, 266; Journal of Convention, 130, 131, 185; 2 Pitk. Hist. 259, note. Mr. Hamilton, it seems, at a subsequent period of the convention, changed his opinion on account of the increased danger to the public tranquillity incident to the election of a magistrate to this degree of permanency. 2 Pitk. Hist. 259, 260, note. Possibly the same change may have occurred in the opinions of others. Journal of Convention, 130, 131.

³ Journal of Convention, 90.

⁴ Id. 92, 136, 224, 225: Id. 286, 287.

divided.¹ In this form the clause stood in the first draft of the Constitution, though some intermediate efforts were made to vary it.² But it was ultimately altered upon the report of a committee, so as to change the mode of election, the term of office, and the re-eligibility, to their present form, by the vote of ten States against one.³

§ 1437. It is most probable that these three propositions had a mutual influence upon the final vote. Those who wished a choice to be made by the people rather than by the national legislature would naturally incline to a shorter period of office than seven years. Those who were in favor of seven years might be willing to consent to the clause against re-eligibility, when they would resist it if the period of office were reduced to four years.⁴ And those who favored the latter might more readily yield the prohibitory clause than increase the duration of office. All this, however, is but conjecture; and the most that can be gathered from the final result is, that opinions strongly maintained at the beginning of the discussion were yielded up in a spirit of compromise, or abandoned upon the weight of argument.⁵

§ 1438. It is observable, that the period actually fixed is intermediate between the term of office of the Senate and that of the House of Representatives. In the course of one presidential term, the House is or may be twice recomposed, and two thirds of the Senate changed or re-elected. So far as executive influence can be presumed to operate upon either branch of the legislature unfavorably to the rights of the people, the latter possess, in their elective franchise, ample means of redress. On the other hand, so far as uniformity and stability in the administration of executive duties are desirable, they are in some measure secured by the more permanent tenure of office of the Senate, which will check too hasty a departure from the old system by a change of the executive or representative branch of the government.⁶

¹ Journal of Convention, 94, 204.

² Id. 190, 191 to 196, 200; Id. 286, 287, 288.

³ Id. 225, 324, 330, 332, 337. See 2 Jefferson's Correspondence, 64, 65; 2 Pittk. Hist. 252, 253; Journal of Convention, 288, 289.

⁴ See 1 Jefferson's Correspondence, pp. 64, 65.

⁵ 3 Elliot's Debates, 99, 100; 2 Id. 358; 1 Jefferson's Correspondence, 64, 65.

⁶ Dr. Paley has condemned all elective monarchies, and, indeed, all elective chief magistrates. "The confession of every writer on the subject of civil government," says he, "the experience of ages, the example of Poland, and of the papal dominions,

§ 1489. Whether the period of four years will answer all the purposes for which the executive department is established, so as to give it at once energy and safety, and to preserve a due balance in the administration of the government, is a problem which can be solved only by experience. That it will contribute far more than a shorter period towards these objects, and thus have a material influence upon the spirit and character of the government, may be safely affirmed ¹ Between the commencement and termination of the period of office there will be a considerable interval, at once to justify some independence of opinion and action, and some reasonable belief that the propriety of the measures adopted during the administration may be seen and felt by the community at large. The executive need not be intimidated in his course by the dread of an immediate loss of public confidence, without the power of regaining it before a new election; and he may, with some confidence, look forward to that esteem and respect of his fellow-citizens, which public services usually obtain when they are faithfully and firmly pursued with an honest devotion to the public good. If he should be re-elected, he will still more extensively possess the means of carrying into effect a wise and beneficent system of policy, foreign as well as domestic. And if he should be compelled to retire, he cannot but have the consciousness that measures, long enough pursued to be found useful, will be persevered in; or, if abandoned, the contrast will reflect new honor upon the past administration of the government, and perhaps reinstate him in office. At all events, the period is not long enough to justify any alarms for the public

seem to place this amongst the few indubitable maxims which the science of government admits of. A crown is too splendid a prize to be conferred upon merit. The passions or interests of the electors exclude all consideration of the qualities of the competitors. The same observation holds concerning the appointments to any office which is attended with a great share of power or emolument. Nothing is gained by a popular choice worth the dissensions, tumults, and interruptions of regular industry, with which it is inseparably attended." Paley's Moral Philosophy, B. 6, ch. 7, p. 367. Mr. Chancellor Kent has also remarked, that it is a curious fact in European history, that on the first partition of Poland, in 1773, when the partitioning powers thought it expedient to foster and confirm all the defects of its wretched government, they sagaciously demanded of the Polish diet that the crown should continue elective. 1 Kent's Comm. Lect. 13, p. 256. America has indulged the proud hope that she shall avoid every danger of this sort, and escape at once from the evils of an hereditary and of an elective monarchy. Who that loves liberty does not wish success to her efforts?

¹ The Federalist, No. 71.

safety.¹ The danger is not, that such a limited executive will become an absolute dictator, but that he may be overwhelmed by the combined operations of popular influence and legislative power. It may be reasonably doubted, from the limited duration of this office, whether, in point of independence and firmness, he will not be found unequal to the task which the Constitution assigns him; and, if such a doubt may be indulged, that alone will be decisive against any just jealousy of his encroachments.² Even in England, where an hereditary monarch with vast prerogatives and patronage exists, it has been found that the House of Commons, from their immediate sympathy with the people and their possession of the purse-strings of the nation, have been able effectually to check all his usurpations and to diminish his influence. Nay, from small beginnings they have risen to be the great power in the state, counterpoising not only the authority of the crown but the rank and wealth of the nobility; and gaining so solid an accession of influence, that they rather lead than follow the great measures of the administration.³

§ 1440. In comparing the duration of office of the President with that of the State executives, additional reasons will present themselves in favor of the former. At the time of the adoption of the Constitution, the executive was chosen annually in some of the States; in others, biennially; and in others, triennially. In some of the States which have been subsequently admitted into the Union, the executive is chosen annually; in others biennially; in others triennially; and in others quadriennially. So that there is a great diversity of opinion exhibited on the subject not only in the early but in the later State constitutions in the Union.⁴ Now it may be affirmed that if, considering the nature of executive duties in the State governments, a period of office of two or three or even four years has not been found either dangerous or inconvenient, there are very strong reasons why the duration of office of the President of the United States should be at least equal to the longest of these periods. The nature of the duties to be performed by the President both at home and abroad are so various and complicated, as not only to require great tal-

¹ 1 Tuck. Black. Comm. App. 318; Rawle on Const. ch. 31, pp. 287 to 290.

² The Federalist, No. 71.

³ Ibid.

⁴ 4 Elliot's Debates, App. 557; Dr. Leiber's *Encyclopædia Americana*, Art. *Constitutions*; The Federalist, No. 39.

ents and great wisdom to perform them in any manner suitable to their importance and difficulty, but also long experience in office to acquire what may be deemed the habits of administration, and a steadiness as well as comprehensiveness of view of all the bearings of measures. The executive duties in the States are few and confined to a narrow range. Those of the President embrace all the ordinary and extraordinary arrangements of peace and war, of diplomacy and negotiation, of finance, of naval and military operations, and of the execution of the laws through almost infinite ramifications of details and in places at vast distances from each other.¹ He is compelled constantly to take into view the whole circuit of the Union; and to master many of the local interests and other circumstances, which may require new adaptations of measures to meet the public exigencies. Considerable time must necessarily elapse before the requisite knowledge for the proper discharge of all the functions of his office can be obtained; and after it is obtained, time must be allowed to enable him to act upon that knowledge so as to give vigor and healthiness to the operations of the government. A short term of office would scarcely suffice, either for suitable knowledge or suitable action. And to say the least, four years employed in the executive functions of the Union would not enable any man to become more familiar with them, than half that period with those of a single State.² In short, the same general considerations which require and justify a prolongation of the period of service of the members of the national legislature beyond that of the members of the State legislatures, apply with full force to the executive department. There have, nevertheless, at different periods of the government, been found able and ingenious minds, who have contended for an annual election of the President, or some shorter period than four years.³

§ 1441. Hitherto our experience has demonstrated, that the period has not been found practically so long as to create danger to the people, or so short as to take away a reasonable independ-

¹ The Federalist, No. 72.

² 1 Kent's Comm. Lect. 13, p. 262.

³ Mr. Senator Hillhouse, in April, 1808, proposed an annual election, among other amendments to the Constitution; and defended the proposition in a very elaborate speech. The amendment, however, found no support. See Hillhouse's Speech, 12th April, 1808, printed at New Haven, by O. Steele & Co. The learned editor of Blackstone's Commentaries manifestly thought a more frequent election than once in four years desirable. 1 Tuck. Black. Comm. App. 328, 329.

ence and energy from the executive. Still, it cannot be disguised, that sufficient time has scarcely yet elapsed to enable us to pronounce a decisive opinion upon the subject; since the executive has generally acted with a majority of the nation, and in critical times has been sustained by the force of that majority in strong measures, and in times of more tranquillity, by the general moderation of the policy of his administration.

§ 1442. Another question, connected with the duration of office of the President, was much agitated in the convention, and has often since been a topic of serious discussion; and that is, whether he should be re-eligible to office. In support of the opinion that the President ought to be ineligible after one period of office, it was urged, that the return of public officers into the mass of the common people, where they would feel the tone which they had given to the administration of the laws, was the best security the public could have for their good behavior. It would operate as a check upon the restlessness of ambition, and at the same time promote the independence of the executive. It would prevent him from a cringing subserviency to procure a re-election, or to a resort to corrupt intrigues for the maintenance of his power.¹ And it was even added by some, whose imaginations were continually haunted by terrors of all sorts from the existence of any powers in the national government, that the re-eligibility of the executive would furnish an inducement to foreign governments to interfere in our elections, and would thus inflict upon us all the evils which had desolated and betrayed Poland.²

§ 1443. In opposition to these suggestions, it was stated, that one ill effect of the exclusion would be a diminution of the inducements to good behavior. There are few men who would not feel much less zeal in the discharge of a duty, when they were conscious that the advantage of a station with which it is connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of obtaining by their merit a continuance of it. A desire of reward is one of the strongest incentives of human conduct; and the best security for the fidelity of mankind is to make interest coincide with duty. Even the love of fame—the ruling passion of the noblest minds—will scarcely prompt a man to undertake extensive and ardu-

¹ See 3 Elliot's Debates, 99; Rawle on Const. ch. 31, p. 283; The Federalist, No. 72.

² See 2 Elliot's Debates, 357; Rawle on Const. ch. 31, p. 283.

ous enterprises, requiring considerable time to mature and perfect, if they may be taken from his management before their accomplishment, or be liable to failure in the hands of a successor. The most, under such circumstances, which can be expected of the generality of mankind, is the negative merit of not doing harm instead of the positive merit of doing good.¹ Another ill effect of the exclusion would be the temptation to sordid views, to speculation, to the corrupt gratification of favorites, and in some instances to usurpation. A selfish or avaricious executive might, under such circumstances, be disposed to make the most he could for himself, and his friends and partisans, during his brief continuance in office, and to introduce a system of official patronage and emoluments, at war with the public interests, but well adapted to his own. If he were vain and ambitious, as well as avaricious and selfish, the transient possession of his honors would depress the former passions, and give new impulses to the latter. He would dread the loss of gain more than the loss of fame; since the power must drop from his hands too soon to insure any substantial addition to his reputation.² On the other hand, his very ambition, as well as his avarice, might tempt him to usurpation; since the chance of impeachment would scarcely be worthy of thought; and the present power of serving friends might easily surround him with advocates for every stretch of authority which would flatter his vanity, or administer to their necessities.

§ 1444. Another ill effect of the exclusion would be depriving the community of the advantage of the experience gained by an able chief magistrate in the exercise of office. Experience is the parent of wisdom. And it would seem almost absurd to say, that it ought systematically to be excluded from the executive office. It would be equivalent to banishing merit from the public councils, because it had been tried. What could be more strange than to declare, at the moment when wisdom was acquired, that the possessor of it should no longer be enabled to use it for the very purposes for which it was acquired?³

§ 1445. Another ill effect of the exclusion would be, that it might banish men from the station, in certain emergencies, in

¹ The Federalist, No. 72; 3 Elliot's Deb. 99, Id. 358.

² The Federalist, No. 72; 2 Elliot's Debates, 358.

³ The Federalist, No. 72; 3 Elliot's Debates, 99, 100.

which their services might be eminently useful, and indeed almost indispensable for the safety of their country. There is no nation which has not at some period or other in its history felt an absolute necessity of the services of particular men in particular stations; and perhaps it is not too much to say, as vital to the preservation of its political existence. In a time of war, or other pressing calamity, the very confidence of a nation in the tried integrity and ability of a single man may of itself insure a triumph. Is it wise to substitute in such cases inexperience for experience, and to set afloat public opinion, and change the settled course of administration?¹ One would suppose, that it should be sufficient to possess the right to change a bad magistrate, without making the singular merit of a good one the very ground of excluding him from office.

§ 1446. Another ground against the exclusion was founded upon our own experience under the State governments of the utility and safety of the re-eligibility of the executive. In some of the States the executive is re-eligible; in others he is not. But no person has been able to point out any circumstance in the administration of the State governments unfavorable to a re-election of the chief magistrate, where the right has constitutionally existed. If there had been any practical evil, it must have been seen and felt. And the common practice of continuing the executive in office in some of these States, and of displacing in others, demonstrates that the people are not sensible of any abuse, and use their power with a firm and unembarrassed freedom at the elections.

§ 1447. It was added, that the advantages proposed by the exclusion, (1) greater independence in the executive, (2) greater security to the people, were not well founded. The former could not be attained in any moderate degree, unless the exclusion was made perpetual. And, if it were, there might be many motives to induce the executive to sacrifice his independence to friends, to partisans, to selfish objects, and to private gain, to the fear of enemies, and the desire to stand well with majorities. As to the latter supposed advantage, the exclusion would operate no check upon a man of irregular ambition, or corrupt principles, and against such men alone could the exclusion be important. In truth, such men would easily find means to cover up their

¹ The Federalist, No. 72; 2 Elliot's Debates, 99, 100.

usurpations and dishonesty under fair pretensions, and mean subserviency to popular prejudices. They would easily delude the people into a belief that their acts were constitutional, because they were in harmony with the public wishes, or held out some specious but false projects for the public good.

§ 1448. Most of this reasoning would apply, though with diminished force, to the exclusion for a limited period, or until after the lapse of an intermediate election to the office. And it would have equally diminished advantages, with respect both to personal independence and public security. In short, the exclusion, whether perpetual or temporary, would have nearly the same effects; and these effects would be generally pernicious, rather than salutary.¹ Re-eligibility naturally connects itself to a certain extent with duration of office. The latter is necessary to give the officer himself the inclination and the resolution to act his part well, and the community time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of his merits. The former is necessary to enable the people, when they see reason to approve of his conduct, to continue him in the station, in order to prolong the utility of his virtues and talents, and to secure to the government the advantage of permanence in a wise system of administration.²

§ 1449. Still, it must be confessed, that where the duration is for a considerable length of time, the right of re-election becomes less important, and perhaps less safe to the public. A President chosen for ten years might be made ineligible with far less impropriety than one chosen for four years. And a President chosen for twenty years ought not to be again eligible, upon the plain ground, that by such a term of office his responsibility would be greatly diminished, and his means of influence and patronage immensely increased, so as to check in a great measure the just expression of public opinion, and the free exercise of the elective franchise. Whether an intermediate period, say of eight years, or of seven years, as proposed in the convention, might not be beneficially combined with subsequent ineligibility, is a point upon which great statesmen have not been agreed; and must be left to the wisdom of future legislators to weigh and decide.³

¹ The Federalist, No. 72; Rawle on the Const. ch. 31, pp. 288, 289.

² The Federalist, No. 72.

³ Mr. Jefferson appears to have entertained the opinion strongly, that the chief

The inconvenience of such frequently recurring elections of the chief magistrate, by generating factions, combining intrigues, and agitating the public mind, seems not hitherto to have attracted as much attention as it deserves. One of two evils may possibly occur from this source; either a constant state of excitement, which will prevent the fair operation of the measures of an administration, or a growing indifference to the election, both on the part of candidates and the people, which will surrender it practically into the hands of the selfish, the office seekers, and the unprincipled devotees of power. It has been justly remarked by Mr. Chancellor Kent, that the election of a supreme executive magistrate for a whole nation affects so many interests, addresses itself so strongly to popular passions, and holds out such powerful temptations to ambition, that it necessarily becomes a strong trial to public virtue, and even hazardous to the public tranquillity.¹

§ 1450. The remaining part of the clause respects the Vice-President. If such an officer was to be created, it is plain that the duration of his office should be co-extensive with that of the President. Indeed, as we shall immediately see, the scheme of the government necessarily embraced it; for when it was decided that two persons were to be voted for, as President, it was decided that he who had the greatest number of votes of the electors, after the person chosen as President, should be Vice-

magistrate ought to be ineligible after one term of office. "Reason and experience tell us," says he, "that the chief magistrate will always be re-elected, if he may be re-elected. He is then an officer for life. This once observed, it becomes of so much consequence to certain nations to have a friend or a foe at the head of our affairs, that they will interfere with money and with arms, &c. The election of a President of America some years hence will be much more interesting to certain nations of Europe, than ever the election of a king of Poland was." Letter to Mr. Madison in 1787, 2 *Jeffer. Corresp.* 274, 275. He added in the same letter: "The power of removing every fourth year by the vote of the people is a power which they will not exercise; and if they were disposed to exercise it, they would not be permitted." See also 2 *Jefferson's Correspondence*, 291, 439, 440, 443. How little has this reasoning accorded with the fact! In the memoir written by him towards the close of his life he says: "My wish was, that the President should be elected for seven years, and be ineligible afterwards. This term I thought sufficient to enable him, with the concurrence of the legislature, to carry through and establish any system of improvement he should propose for the general good. But the practice adopted, I think, is better, allowing his continuance for eight years, with a liability to be dropped at half way of the term, making that a period of probation." 1 *Jefferson's Corresp.* 64, 65. See also 1 *Tuck. Black. Comm. App.* 328, 329.

¹ 1 *Kent's Comm. Lect.* 13, p. 257.

President. The principal question, therefore, was, whether such an officer ought to be created. It has been already stated, that the original scheme of the government did not provide for such an officer. By that scheme, the President was to be chosen by the national legislature.¹ When, afterwards, an election by electors chosen directly or indirectly by the people, was proposed by a select committee, the choice of a Vice-President constituted a part of the proposition; and it was finally adopted by the vote of ten States against one.²

§ 1451. The appointment of a Vice-President was objected to, as unnecessary and dangerous. As president of the Senate, he would be entrusted with a power to control the proceedings of that body; and as he must come from some one of the States, that State would have a double vote in the body. Besides, it was said, that if the President should die, or be removed, the Vice-President might, by his influence, prevent the election of a President. But, at all events, he was a superfluous officer, having few duties to perform, and those might properly devolve upon some other established officer of the government.³

§ 1452. The reasons in favor of the appointment were, in part, founded upon the same ground as the objections. It was seen that a presiding officer must be chosen for the Senate, where all the States were equally represented, and where an extreme jealousy might naturally be presumed to exist of the preponderating influence of any one State. If a member of the Senate were appointed, either the State would be deprived of one vote, or would enjoy a double vote in case of an equality of votes, or there would be a tie, and no decision. Each of these alternatives was equally undesirable, and might lay the foundation of great practical inconveniences. An officer, therefore, chosen by the whole Union, would be a more suitable person to preside, and give a casting vote, since he would be more free than any member of the Senate from local attachments and local interests; and being the representative of the Union, would naturally be induced to consult the interests of all the States.⁴ Having only a casting vote, his influence could only operate exactly when most bene-

¹ Journal of Convention, 68, 92, 186, 224.

² Journal of Convention, 323, 324, 333, 337.

³ See 2 Elliot's Debates, 359, 361; The Federalist, No. 68.

⁴ 3 Elliot's Debates, 37, 38, 51, 52; The Federalist, No. 68.

ficial; that is, to procure a decision. A still more important consideration is the necessity of providing some suitable person to perform the executive functions, when the President is unable to perform them, or is removed from office. Every reason which recommends the mode of election of the President prescribed by the Constitution, with a view either to dignity, independence, or personal qualifications for office, applies with equal force to the appointment of his substitute. He is to perform the same duties, and to possess the same rights; and it seems, if not indispensable, at least peculiarly proper, that the choice of the person who should succeed to the executive functions, should belong to the people at large, rather than to a select body chosen for another purpose. If, as was suggested, the president of the Senate, chosen by that body, might have been designated as the constitutional substitute, it is by no means certain that he would either possess so high qualifications, or enjoy so much public confidence, or feel so much responsibility for his conduct, as a Vice-President selected directly by and from the people. The president of the Senate would generally be selected from other motives, and with reference to other qualifications, than what ordinarily belonged to the executive department. His political opinions might be in marked contrast with those of a majority of the nation; and while he might possess a just influence in the Senate as a presiding officer, he might be deemed wholly unfit for the various duties of the chief executive magistrate. In addition to these considerations, there was no novelty in the appointment of such an officer for similar purposes in some of the State governments;¹ and it therefore came recommended by experience, as a safe and useful arrangement, to guard the people against the inconveniences of an *interregnum* in the government, or a devolution of power upon an officer who was not their choice, and might not possess their confidence.

§ 1453. The next clause embraces the mode of election of the President and Vice-President; and although it has been repealed, by an amendment of the Constitution, as will be hereafter shown, yet it still deserves consideration as a part of the original scheme, and more especially as very grave doubts have been entertained whether the substitute is not inferior in wisdom and convenience.

§ 1454. The clause is as follows: "Each State shall appoint,

¹ The Federalist, No. 68.

in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress. But no senator, or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

“The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.”

§ 1455. It has been already remarked, that originally, in the convention, the choice of the President was, by a vote of eight States against two, given to the national legislature.¹ This mode of appointment, however, does not seem to have been satisfactory; for a short time afterwards, upon a reconsideration of the subject, it was voted, by six States against three, one being divided, that the President should be chosen by electors appointed for that purpose; and, by eight States against two, that the elec-

¹ Journal of Convention, 68, 92, 136, 224, 225; Id. 236, 287.

tors should be chosen by the legislatures of the States.¹ Upon a subsequent discussion, by the vote of seven States against four, the choice was restored to the national legislature.² Towards the close of the convention the subject was referred to a committee, who reported a scheme in many respects as it now stands. The clause as to the mode of choice by electors was carried by the vote of nine States against two; that respecting the time and place and manner of voting of the electors, by ten States against one; that respecting the choice by the House of Representatives, in case no choice was made by the people, by ten States against one.³

§ 1456. One motive which induced a change of the choice of the President from the national legislature unquestionably was, to have the sense of the people operate in the choice of the person to whom so important a trust was confided. This would be accomplished much more perfectly, by committing the right of choice to persons selected for that sole purpose at the particular conjuncture, instead of persons selected for the general purposes of legislation.⁴ Another motive was to escape from those intrigues and cabals which would be promoted in the legislative body by artful and designing men, long before the period of the choice, with a view to accomplish their own selfish purposes.⁵ The very circumstance that the body entrusted with the power was chosen long before the presidential election, and for other general functions, would facilitate every plan to corrupt or manage them. It would be in the power of an ambitious candidate, by holding out the rewards of office, or other sources of patronage and honor, silently but irresistibly to influence a majority of votes; and thus, by his own bold and unprincipled conduct, to secure a choice, to the exclusion of the highest, and purest, and most enlightened men in the country. Besides, the very circumstance of the possession of the elective power would mingle itself with all the ordinary measures of legislation. Compromises and bargains would be made, and laws passed to gratify particular members, or conciliate particular interests; and thus

¹ Journal of Convention, 190, 191.

² Id. 200. See Id. 286, 287.

³ Journal of Convention, 324, 333, 334, 335, 336, 337. The committee of the convention reported in favor of a choice by *the Senate*, in case there was none by the people. Journal of Convention, 325.

⁴ The Federalist, No. 68.

⁵ 2 Wilson's Law Lect. 187.

a disastrous influence would be shed over the whole policy of the government. The President would, in fact, become the mere tool of the dominant party in Congress; and would, before he occupied the seat, be bound down to an entire subserviency to their views.¹ No measure would be adopted which was not, in some degree, connected with the presidential election; and no presidential election made but what would depend upon artificial combinations and a degrading favoritism.² There would be ample room for the same course of intrigues which has made memorable the choice of a king in the Polish diet, of a chief in the Venetian senate, and of a pope in the sacred college of the Vatican.

§ 1457. Assuming that the choice ought not to be confided to the national legislature, there remained various other modes by which it might be effected, — by the people directly; by the State legislatures; or by electors chosen by the one or the other. The latter mode was deemed most advisable; and the reasoning by which it was supported was to the following effect: The immediate election should be made by men the most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the inducements which ought to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass for this special object, would be most likely to possess the information and discernment and independence essential for the proper discharge of the duty.³ It is also highly important to afford as little opportunity as possible to tumult and disorder. These evils are not unlikely to occur in the election of a chief magistrate directly by the people, considering the strong excitements and interests which such an occasion may naturally be presumed to produce. The choice of a number of persons to form an intermediate body of electors, would be far less apt to convulse the community with any extraordinary or violent movements, than the choice of one who was himself the final object of the public wishes. And as the electors chosen in each State are to assemble and vote in the State in which they are chosen, this detached and divided situation would expose them much less to

¹ Rawle on the Constitution, ch. 5, p. 58.

² See 1 Kent's Comm. Lect. 13, pp. 261, 262.

³ The Federalist, No. 68

heats and ferments, which might be communicated from them to the people, than if they were all convened at one time in one place.¹ The same circumstances would naturally lessen the dangers of cabal, intrigue, and corruption, especially if Congress should, as they undoubtedly would, prescribe the same day for the choice of the electors and for giving their votes throughout the United States. The scheme, indeed, presents every reasonable guard against these fatal evils to republican governments. The appointment of the President is not made to depend upon any pre-existing body of men, who might be tampered with beforehand to prostitute their votes; but is delegated to persons chosen by the immediate act of the people, for that sole and temporary purpose. All those persons, who, from their situation, might be suspected of too great a devotion to the President in office, such as senators, and representatives, and other persons holding offices of trust or profit under the United States, are excluded from eligibility to the trust. Thus, without corrupting the body of the people, the immediate agents in the election may be fairly presumed to enter upon their duty free from any sinister bias. Their transitory existence and dispersed situation would present formidable obstacles to any corrupt combinations; and time, as well as means, would be wanting to accomplish, by bribery or intrigue of any considerable number, a betrayal of their duty.² The President, too, who should be thus appointed, would be far more independent than if chosen by a legislative body, to whom he might be expected to make correspondent sacrifices, to gratify their wishes or reward their services.³ And on the other hand, being chosen by the voice of the people, his gratitude would take the natural direction, and sedulously guard their rights.⁴

¹ The Federalist, No. 68; 1 Kent's Comm. Lect. 13, pp. 261, 262.

² The Federalist, No. 68; 1 Tuck. Black. Comm. App. 326, 327; 2 Wilson's Law Lect. 187, 188, 189.

³ Ibid.

⁴ In addition to these grounds, it has been suggested that a still greater and more insuperable difficulty against a choice directly by the people, as a single community, was, that such a measure would be an entire consolidation of the government of the country, and an annihilation of the State sovereignties, so far as concerned the organization of the executive department of the Union. This was not to be permitted or endured; and it would, besides, have destroyed the balance of the Union, and reduced the weight of the slaveholding States to a degree which they would have deemed altogether inadmissible. 1 Kent's Comm. Lect. 13, p. 261. It is not perceived, how

§ 1458. The other parts of the scheme are no less entitled to commendation. The number of electors is equal to the number of senators and representatives of each State; thus giving to each State as virtual a representation in the electoral colleges as that which it enjoys in Congress. The votes, when given, are to be transmitted to the seat of the national government, and there opened and counted in the presence of both houses. The person having a majority of the whole number of votes is to be President. But if no one of the candidates has such a majority, then the House of Representatives, the popular branch of the government, is to elect from the five highest on the list the person whom they may deem best qualified for the office, each State having one vote in the choice. The person who has the next highest number of votes after the choice of President, is to be Vice-President. But, if two or more shall have equal votes, the Senate are to choose the Vice-President. Thus, the ultimate functions are to be shared alternately by the Senate and Representatives in the organization of the executive department.¹

§ 1459. "This process of election," adds the Federalist, with a somewhat elevated tone of satisfaction, "affords a moral certainty that the office of President will seldom fall to the lot of a man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little

either of these results could have taken place, unless upon some plan (which was never proposed) which should disregard altogether the existence of the States, and take away all representation of the slave population. The choice might have been directly by the people without any such course. And in point of fact, such an objection as that suggested by Mr. Chancellor Kent, to a choice by the people, does not seem to have occurred to the authors of the Federalist. If the choice had been directly by the people, each State having as many votes for President as it would be entitled to electors, the result would have been exactly as it now is. If each State had been entitled to one vote only, then the State sovereignties would have been completely represented by the people of each State upon an equality. If the choice had been by the people in districts, according to the ratio of representation, then the President would have been chosen by a majority of the people in a majority of the representative districts. There would be no more a consolidation than there now is in the House of Representatives. In neither view could there be any injurious inequality bearing on the Southern States.

¹ Mr. Chancellor Kent has summed up the general arguments in favor of an election by electors with great felicity. 1 Kent's Comm. Lect. 13, pp. 261, 262. And the subject of the organization of the executive department is also explained, with much clearness and force, by the learned editor of Blackstone's Commentaries, and by Mr. Rawle in his valuable labors. 1 Tuck. Black. Comm. App. 325 to 328; Rawle on Const. ch. 5, pp. 51 to 55; 2 Wilson's Law Lectures, 186 to 189.

arts of popularity, may alone suffice to elevate a man to the first honors of a single State. But it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as will be necessary to make him a successful candidate for the distinguished office of president of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration.”¹

§ 1460. The mode of election of the President thus provided for has not wholly escaped censure, though the objections have been less numerous than those brought against many other parts of the Constitution, touching that department of the government.²

§ 1461. One objection was, that he is not chosen directly by the people, so as to secure a proper dependence upon them. And in support of this objection it has been urged, that he will in fact owe his appointment to the State governments; for it will become the policy of the States, which cannot directly elect a President, to prevent his election by the people, and thus to throw the choice into the House of Representatives, where it will be decided by the votes of States.³ Again, it was urged, that this very mode of choice by States in the House of Representatives is most unjust and unequal. Why, it has been said, should Delaware, with her single representative, possess the same vote with Virginia, with ten times that number?⁴ Besides, this mode of choice by the House of Representatives will give rise to the worst intrigues; and if ever the arts of corruption shall prevail in the choice of a President, they will prevail by first throwing the choice into the House of Representatives, and then assailing the virtue and independence of members holding the State vote by all those motives of honor and reward which can so easily be applied by a bold and ambitious candidate.⁵

¹ The Federalist, No. 68.

² See The Federalist, No. 68; 2 Elliot's Debates, 360 to 363.

³ 2 Elliot's Debates, 360, 361.

⁴ 1 Tuck. Black. Comm. App. 327.

⁵ Id. 327, 328.

§ 1462. The answer to these objections has been already in a great measure anticipated in the preceding pages. But it was added, that the devolution of the choice upon the House of Representatives was inevitable, if there should be no choice by the people; and it could not be denied, that it was a more appropriate body for this purpose than the Senate, seeing that the latter were chosen by the State legislatures, and the former by the people. Besides, the connection of the Senate with the executive department might naturally produce a strong influence in favor of the existing executive, in opposition to any rival candidate.¹ The mode of voting by States, if the choice came to the House of Representatives, was but a just compensation to the smaller States for their loss in the primary election. When the people vote for the President, it is manifest that the large States enjoy a decided advantage over the small States; and thus their interests may be neglected or sacrificed. To compensate them for this in the eventual election by the House of Representatives, a correspondent advantage is given to the small States. It was in fact a compromise.² There is no injustice in this; and if the people do not elect a President, there is a greater chance of electing one in this mode than there would be by a mere representative vote according to numbers; as the same divisions would probably exist in the popular branch as in their respective States.³

§ 1463. It has been observed with much point, that in no respect have the enlarged and liberal views of the framers of the Constitution, and the expectations of the public when it was adopted, been so completely frustrated as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges.⁴ It is notorious that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them. Nay, upon some occasions the electors publicly pledge themselves to vote for a particular person; and thus, in effect, the whole foundation of the system, so elaborately constructed, is subverted.⁵ The candidates for the presidency are selected and announced in each State long before the election; and an ardent canvass is maintained in the newspapers, in party meetings, and in the State

¹ 1 Tuck. Black. Comm. App. 327, 328.

² 2 Elliot's Debates, 364.

³ Rawle on the Constitution, ch. 5, p. 54.

⁴ Id. pp. 57, 58.

⁵ Ibid.

legislatures, to secure votes for the favorite candidate, and to defeat his opponents. Nay, the State legislatures often become the nominating body, acting in their official capacities, and recommending by solemn resolves their own candidate to the other States.¹ So that nothing is left to the electors after their choice but to register votes which are already pledged; and an exercise of an independent judgment would be treated as a political usurpation, dishonorable to the individual, and a fraud upon his constituents.

§ 1464. The principal difficulty which has been felt in the mode of election is the constant tendency, from the number of candidates, to bring the choice into the House of Representatives. This has already occurred twice in the progress of the government; and in the future there is every probability of a far more frequent occurrence. This was early foreseen; and, even in one of the State conventions, a most distinguished statesman, and one of the framers of the Constitution, admitted that it would probably be found impracticable to elect a President by the immediate suffrages of the people; and that in so large a country many persons would probably be voted for, and that the lowest of the five highest on the list might not have an inconsiderable number of votes.² It cannot escape the discernment of any attentive observer, that if the House of Representatives is often to choose a President, the choice will, or at least may, be influenced by many motives, independent of his merits and qualifications. There is danger that intrigue and cabal may mix in the rivalries and strife.³ And the discords, if not the corruptions, generated by the occasion, will probably long outlive the immediate choice, and scatter their pestilential influences over all the great interests of the country. One fearful crisis was passed in the choice of Mr. Jefferson over his competitor, Mr. Burr, in 1801, which threatened a dissolution of the government,⁴ and put the issue upon the tried patriotism of one or two individuals, who yielded

¹ Rawle on the Constitution, ch. 5, pp. 57, 58. A practice which has been censured by some persons, as still more alarming, is the nomination of the President by members of Congress at political meetings at Washington; thus, in the mild form of recommendation, introducing their votes into the election with all their official influence. Rawle on Const. ch. 5, p. 58.

² Mr. Madison, 2 Elliot's Debates, 364.

³ 1 Tuck. Black. Comm. App. 327; 1 Kent's Comm. Lect. 13, p. 261.

⁴ 1 Kent's Comm. Lect. 13, p. 262.

from a sense of duty their preference of the candidate generally supported by their friends.¹

§ 1465. Struck with these difficulties, it has been a favorite opinion of many distinguished statesmen, especially of late years, that the choice ought to be directly by the people, in representative districts; a measure which, it has been supposed, would at once facilitate a choice by the people in the first instance, and interpose an insuperable barrier to any general corruption or intrigue in the election. Hitherto this plan has not possessed extensive public favor. Its merits are proper for discussion elsewhere, and do not belong to these commentaries.

§ 1466. The issue of the contest of 1801 gave rise to an amendment of the Constitution in several respects materially changing the mode of election of President. In the first place, it provides that the ballots of the electors shall be separately given for President and Vice-President, instead of one ballot for two persons as President; that the Vice-President (like the President) shall be chosen by a majority of the whole number of electors appointed; that the number of candidates, out of whom the selection of President is to be made by the House of Representatives, shall be three, instead of five; that the Senate shall choose the Vice-President from the two highest numbers on the list; and that, if no choice is made of President before the fourth of March following, the Vice-President shall act as President.

§ 1467. The amendment was proposed in October, 1803, and

¹ Allusion is here especially made to the late Mr. Bayard, who held the vote of Delaware, and who, by his final vote in favor of Mr. Jefferson, decided the election. It was remarked at the time, that in the election of Mr. Jefferson, in 1801, the votes of two or three States were held by persons who soon afterwards received office from him. The circumstance is spoken of in positive terms by Mr. Bayard, in his celebrated Speech on the Judiciary, in 1802. *Debates on the Judiciary*, printed by Whitney & Co., Albany, 1802, pp. 418, 419. Mr. Bayard did not make it matter of accusation against Mr. Jefferson, as founded in corrupt bargaining. Nor has any such charge been subsequently made. The fact is here stated merely to show how peculiarly delicate the exercise of such functions necessarily is; and how difficult it may be, even for the most exalted and pure executive, to escape suspicion or reproach, when he is not chosen directly by the people. Similar suggestions will scarcely ever fail of being made, whenever a distinguished representative obtains office after an election of President, to which he has contributed. The learned editor of *Blackstone's Commentaries* has spoken with exceeding zeal of the dangers arising from the intrigues and cabals of an election by the House of Representatives. 1 Tuck. *Black. Comm. App.* 327.

was ratified before September, 1804,¹ and is in the following terms:—

“The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit, sealed, to the seat of government of the United States, directed to the president of the Senate; the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then, from the persons having the highest numbers, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

“The person having the greatest number of votes, as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

“But no person, constitutionally ineligible to the office of

¹ Journal of Convention, Supp. 484, 488.

President, shall be eligible to that of Vice-President of the United States."

§ 1468. This amendment has alternately been the subject of praise and blame, and experience alone can decide whether the changes proposed by it are, in all respects, for the better or the worse.¹ In some respects it is a substantial improvement. In the first place, under the original mode the Senate was restrained from acting until the House of Representatives had made their selection, which, if parties ran high, might be considerably delayed. By the amendment the Senate may proceed to a choice of the Vice-President immediately, on ascertaining the returns of the votes.² In the next place, under the original mode, if no choice should be made of a President by the House of Representatives until after the expiration of the term of the preceding officer, there would be no person to perform the functions of the office, and an *interregnum* would ensue, and a total suspension of the powers of government.³ By the amendment the new Vice-President would in such a case act as President. By the original mode the Senate are to elect the Vice-President by ballot; by the amendment the mode of choice is left open, so that it may be *viva voce*. Whether this be an improvement or not may be doubted.

§ 1469. On the other hand, the amendment has certainly greatly diminished the dignity and importance of the office of Vice-President. Though the duties remain the same, he is no longer a competitor for the presidency, and selected, as possessing equal merit, talents, and qualifications, with the other candidate. As every State was originally compelled to vote for two candidates (one of whom did not belong to the State) for the same office, a choice was fairly given to all other States to select between them; thus excluding the absolute predominance of any local interest or local partiality.

§ 1470. In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions

¹ 1 Kent's Comm. Lect. 13, p. 262; Rawle on Const. ch. 5, pp. 54, 55.

² Rawle on Const. ch. 5, p. 54; 1 Kent's Comm. Lect. 13, p. 260.

³ Mr. Rawle is of opinion that the old Vice-President would, under the old mode, act as President in case of a non-election of President. I cannot find in the Constitution any authority for such a position. Rawle on Const. ch. 5, p. 54. See, also, Act of Congress, 1st March, 1792, ch. 8.

which may arise as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons who gave the votes, or the manner or circumstances in which they ought to be counted. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary than to open the certificates which were produced, in the presence of both houses, and to count the names and numbers, as returned. Yet it is easily to be conceived, that very delicate and interesting inquiries may occur, fit to be debated and decided by some deliberative body.¹ (a) In fact, a question did occur upon the counting of the votes for the presidency in 1821, upon the re-election of Mr. Monroe, whether the votes of the State of Missouri could be counted; but as the count would make no difference in the choice, and the declaration was made of his re-election, the Senate immediately withdrew; and the jurisdiction, as well as the course of proceeding in a case of real controversy, was left in a most embarrassing situation.

§ 1471. Another defect in the Constitution is, that no provision was originally, or is now made, for a case where there is an equality of votes by the electors for more persons than the constitutional number from which the House of Representatives is to make the election. The language of the original text is, that the House shall elect "from the five highest on the list." Suppose there were six candidates, three of whom had an equal number; who are to be preferred? The amendment is, that the House shall elect "from the persons having the highest numbers, not exceeding three." Suppose there should be four candidates, two of whom should have an equality of votes; who are to be preferred? Such a case is quite within the range of probability; and may hereafter occasion very serious dissensions. One object in lessening the number of the persons to be balloted for from five to three, doubtless was, to take away the chance of any person having very few votes from being chosen President against the general sense of the nation.² (b) Yet it is obvious now that

¹ See 1 Kent's Comm. Lect. 13, pp. 258, 259.

² 2 Elliot's Debates, 362, 363.

(a) The proceedings in Congress in 1869 and 1873, in counting the votes, may be mentioned in this connection, to show the difficulties and the dangers involved.

(b) And yet a candidate receiving a very few electoral votes may possibly be the choice of a larger number of electors than the successful candidate. In 1860, 1,291,574 voters expressed a preference for

a person having but a very small number of electoral votes might, under the present plan, be chosen President, if the other votes were divided between two eminent rival candidates; the friends of each of whom might prefer any other to such rival candidate. Nay, their very hostility to each other might combine them in a common struggle to throw the final choice upon the third candidate, whom they might hope to control or fear to disoblige.

§ 1472. It is observable that the language of the Constitution is, that "each State shall appoint, in such manner as the legislature thereof may direct," the number of electors to which the State is entitled. Under this authority the appointment of electors has been variously provided for by the State legislatures. In some States, the legislature have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole State; and in others by the people in electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district.¹ No question has ever arisen as to the constitutionality of either mode, except that of a direct choice by the legislature. But this, though often doubted by able and ingenious minds,² has been firmly established in practice ever since the adoption of the Constitution; and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it.³ At present, in nearly all the States, the electors are chosen either by the people by a general ticket or by the State legislature. The choice in districts has been gradually abandoned, and is now persevered in but by two States.⁴ (a) The inequality of this mode of choice, unless it should become general throughout the Union, is so obvious that it is rather matter of surprise that it should not long since have been wholly abandoned. In case of any party divisions in a State, it may neutralize its whole vote, while all the other States give an unbroken electoral vote. On this account, and for the sake of uniformity, it has been thought

¹ 1 Tuck. Black. Comm. App. 326.

² See 3 Elliot's Debates, 100, 101.

³ See 2 Wilson's Law Lect. 187.

⁴ See Rawle on Const. ch. 5, p. 55.

Mr. Douglas, who nevertheless received 12 electoral votes only, while Mr. Breckenridge, being the choice of about two-thirds as many voters, received exactly six times as many electoral votes. And Mr. Bell,

whose popular vote was only about half as great, received more than three times as many electoral votes.

(a) Now by none.

desirable by many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people.

§ 1473. The remaining part of the clause which precludes any senator, representative, or person holding an office of trust or profit under the United States, from being an elector, has been already alluded to, and requires little comment. The object is, to prevent persons holding public stations under the government of the United States from any direct influence in the choice of a President. In respect to persons holding office, it is reasonable to suppose that their partialities would all be in favor of the re-election of the actual incumbent; and they might have strong inducements to exert their official influence in the electoral college. (a) In respect to senators and representatives, there is this additional reason for excluding them, that they would be already committed by their vote in the electoral college; and thus, if there should be no election by the people, they could not bring to the final vote either the impartiality or the independence which the theory of the Constitution contemplates.

§ 1474. The next clause is, "The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States."

§ 1475. The propriety of this power would seem to be almost self-evident. Every reason of public policy and convenience seems in favor of a fixed time of giving the electoral votes, and that it should be the same throughout the Union. Such a measure is calculated to repress political intrigues and speculations, by rendering a combination among the electoral colleges, as to their votes, if not utterly impracticable, at least very difficult; and thus secures the people against those ready expedients which corruption never fails to employ to accomplish its designs.¹ The

¹ § Elliot's Debates, 100, 101.

(a) All these precautions assume that the elector is to be entirely at liberty to act according to the dictates of his own judgment when the period arrives for casting his vote; but whatever may be the theory, the fact is otherwise. See *ante*, § 1463.

A dilemma was presented, however, in 1872. One of the candidates for Presi-

dent, Mr. Greeley, died after the popular election, and before the electoral colleges had convened. Under such circumstances, the electors chosen to vote for him were left at liberty to vote as they pleased; and as they did not constitute a majority, so as to make united action important, they scattered their votes according to personal preferences.

arts of ambition are thus in some degree checked, and the independence of the electors against external influence in some degree secured. This power, however, did not escape objection in the general or the State conventions, though the objection was not extensively insisted on.¹

§ 1476. In pursuance of the authority given by this clause, Congress in 1792 passed an act, declaring that the electors shall be appointed in each State within thirty-four days preceding the first Wednesday in December, in every fourth year succeeding the last election of President, according to the apportionment of representatives and senators then existing. (a) The electors chosen are required to meet and give their votes on the said first Wednesday of December, at such place in each State as shall be directed by the legislature thereof. They are then to make and sign three certificates of all the votes by them given, and to seal up the same, certifying on each that a list of the votes of such State for President and Vice President is contained therein; and shall appoint a person to take charge of and deliver one of the same certificates to the president of the Senate at the seat of government, before the first Wednesday of January then next ensuing; another of the certificates is to be forwarded forthwith by the post-office to the president of the Senate at the seat of government; and the third is to be delivered to the judge of the district in which the electors assembled.² Other auxiliary provisions are made by the same act for the due transmission and preservation of the electoral votes, and authenticating the appointment of the electors. The President's term of office is also declared to commence on the fourth day of March next succeeding the day on which the votes of the electors shall be given.³

§ 1477. The next clause respects the qualifications of the President of the United States. "No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President. Neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

¹ Journal of Convention, 325, 331, 333, 335; 3 Elliot's Debates, 100, 101.

² Act of 1st March, 1792, ch. 8.

³ Ibid.

(a) Now they are to be chosen on the Tuesday next after the first Monday of November. Act of Jan. 23, 1845.

§ 1478. Considering the nature of the duties, the extent of the information, and the solid wisdom and experience required in the executive department, no one can reasonably doubt the propriety of some qualification of age. That which has been selected is the middle age of life, by which period the character and talents of individuals are generally known and fully developed; and opportunities have usually been afforded for public service, and for experience in the public councils. The faculties of the mind, if they have not then attained to their highest maturity, are in full vigor, and hastening towards their ripest state. The judgment, acting upon large materials, has, by that time, attained a solid cast; and the principles which form the character, and the integrity which gives lustre to the virtues of life, must then, if ever, have acquired public confidence and approbation.¹

§ 1479. It is indispensable, too, that the President should be a natural born citizen of the United States, or a citizen at the adoption of the Constitution, and for fourteen years before his election. This permission of a natural citizen to become President is an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties. It was doubtless introduced (for it has now become by lapse of time merely nominal, and will soon become wholly extinct) out of respect to those distinguished revolutionary patriots who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country.² A positive exclusion of them from the office would have been unjust to their merits and painful to their sensibilities. But the general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe. Germany, Poland, and even the pontificate of Rome, are sad but instructive examples of the enduring mischiefs arising from this source.³ A residence of four-

¹ See 1 Kent's Comm. Lect. 13, p. 273.

² Journ. of Convention, 267, 325, 361.

³ 1 Kent's Comm. Lect. 13, p. 255; 1 Tuck. Black. Comm. App. 323.

teen years in the United States is also made an indispensable requisite for every candidate; so that the people may have a full opportunity to know his character and merits, and that he may have mingled in the duties, and felt the interests, and understood the principles, and nourished the attachments, belonging to every citizen in a republican government.¹ By "residence," in the Constitution, is to be understood, not an absolute inhabitancy within the United States during the whole period, but such an inhabitancy as includes a permanent domicil in the United States. No one has supposed that a temporary absence abroad on public business, and especially on an embassy to a foreign nation, would interrupt the residence of a citizen, so as to disqualify him for office.² If the word were to be construed with such strictness, then a mere journey through any foreign adjacent territory, for health or for pleasure, or a commorancy there for a single day would amount to a disqualification. Under such a construction, a military or civil officer, who should have been in Canada during the late war on public business, would have lost his eligibility. The true sense of residence in the Constitution is fixed domicil, or being out of the United States, and settled abroad for the purpose of general inhabitancy, *animo manendi*, and not for a mere temporary and fugitive purpose, *in transitu*.

§ 1480. The next clause is, "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the duties of the said office, the same shall devolve on the Vice-President. And the Congress may by law provide for the case of removal, death, resignation, or inability of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or a President shall be elected." (a)

§ 1481. The original scheme of the Constitution did not embrace, as has been already stated, the appointment of any Vice-

¹ 1 Kent's Comm. Lect. 13, p. 255; 1 Tuck. Black. Comm. App. 323.

² Rawle on Const. ch. 31, p. 287.

(a) Four cases have now occurred of Vice-Presidents succeeding to the presidency by the death of the incumbent; but in no instance has a second vacancy occurred within the term, thereby making the President *pro tem.* of the Senate or the

speaker of the House the acting President. Had President Johnson been convicted when tried on impeachment, Mr. Wade, then the presiding officer of the Senate, would have succeeded him.

President; and in case of the death, resignation, or disability of the President, the president of the Senate was to perform the duties of his office.¹ The appointment of a Vice-President was carried by a vote of ten States to one.² Congress, in pursuance of the power here given, have provided that in case of the removal, death, resignation, or inability of the President and Vice-President, the president of the Senate *pro tempore*, and in case there shall be no president, then the speaker of the House of Representatives for the time being shall act as President, until the disability be removed, or a President shall be elected.³ (a)

§ 1482. No provision seems to be made, or at least directly made, for the case of the non-election of any President and Vice-President at the period prescribed by the Constitution. The case of a vacancy by removal, death, or resignation, is expressly provided for; but none of a vacancy by the expiration of the official term of office. A learned commentator has thought that such a case is not likely to happen until the people of the United States shall be weary of the Constitution and government, and shall adopt this method of putting a period to both; a mode of dissolution which seems, from its peaceable character, to recommend itself to his mind as fit for such a crisis.⁴ But no absolute dissolution of the government would constitutionally take place by

¹ Journal of Convention, pp. 225, 226.

² Journal of Convention, pp. 324, 333, 337.

³ Act of 1st March, 1792, ch. 8, § 9. If the office should devolve on the speaker, after the Congress for which the last speaker was chosen had expired, and before the next meeting of Congress, it might be a question, who is to serve; and whether the speaker of the House of Representatives, then extinct, could be deemed the person intended. 1 Kent's Comm. Lect. 13, pp. 260, 261. In order to provide for the exigency of a vacancy in the office of President during the recess of Congress, it has become usual for the Vice-President, a few days before the termination of each session of Congress, to retire from the chair of the Senate, to enable that body to elect a President *pro tempore*, to be ready to act in any case of emergency. Rawle on Const. ch. 5, p. 57.

⁴ 1 Tuck. Black. Comm. App. 320.

(a) The whole subject of the succession, in order, has recently been adjusted by legislation, in which both of the present great parties of the country practically united. The Secretary of State by this legislation is next in order after the Vice-President, and then the Secretary of the Treasury; other members of the President's

Cabinet following in a fixed order the Vice-President so as to continue the office in the party which succeeded in the last election. Act of July 19, 1886. After the members of the Cabinet come, it seems, the president *pro tem.* of the Senate (who, before, would have followed the Vice-President), then the speaker of the House.

such a non-election. The only effect would be, a suspension of the powers of the executive part of the government, and incidentally of the legislative powers, until a new election to the presidency should take place at the next constitutional period; an evil of very great magnitude, but not equal to a positive extinguishment of the Constitution. But the event of a non-election may arise, without any intention on the part of the people to dissolve the government. Suppose there should be three candidates for the presidency, and two for the vice-presidency, each of whom should receive, as nearly as possible, the same number of votes; which party, under such circumstances, is bound to yield up its own preference? May not each feel equally and conscientiously the duty to support to the end of the contest its own favorite candidate in the House of Representatives? Take another case. Suppose two persons should receive a majority of all the votes for the presidency, and both die before the time of taking office, or even before the votes are ascertained by Congress. There is nothing incredible in the supposition that such an event may occur. It is not nearly as improbable as the occurrence of the death of three persons, who had held the office of President, on the anniversary of our independence, and two of these in the same year. In each of these cases there would be a vacancy in the office of President and Vice-President by mere efflux of time; and it may admit of doubt, whether the language of the Constitution reaches them. If the Vice-President should succeed to the office of President, he will continue in it until the regular expiration of the period for which the President was chosen; for there is no provision for the choice of a new President, except at the regular period, when there is a Vice-President in office; and none for the choice of a Vice-President, except when a President also is to be chosen.¹

§ 1483. Congress, however, have undertaken to provide for every case of a vacancy both of the offices of President and Vice-President; and have declared that, in such an event, there shall immediately be a new election made, in the manner prescribed by the act.² How far such an exercise of power is constitutional has never yet been solemnly presented for decision. The point was hinted at in some of the debates, when the Constitution was

¹ See Rawle on Constitution, ch. 5 p. 56.

² Act of 1st March, 1792, ch. 8, § 11.

adopted; and it was then thought to be susceptible of some doubt.¹ Every sincere friend of the Constitution will naturally feel desirous of upholding the power, as far as he constitutionally may.² But it would be more satisfactory to provide for the case by some suitable amendment, which should clear away every doubt, and thus prevent a crisis dangerous to our future peace, if not to the existence of the government.

§ 1484. What shall be the proper proof of the resignation of the President or Vice-President, or of their refusal to accept the office, is left open by the Constitution. But Congress, with great wisdom and forecast, have provided that it shall be by some instrument in writing, declaring the same, subscribed by the party, and delivered into the office of the Secretary of State.³

§ 1485. The next clause is, "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States or any of them."

§ 1486. It is obvious that, without due attention to the proper support of the President, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over his salary and emolument, would soon render him obsequious to their will. A control over a man's living is in most cases a control over his actions. To act upon any other view of the subject would be to disregard the voice of experience, and the operation of the invariable principles which regulate human conduct. There are, indeed, men who could neither be distressed nor won into a sacrifice of their duty. But this stern virtue is the growth of few soils; and it will be found that the general lesson of human life is, that men obey their interests, — that they may be driven by poverty into base compliances, or tempted by largesses to a desertion of duty.⁴ Nor have there been wanting

¹ 2 Elliot's Debates, 359, 360.

² In the revised draft of the Constitution, the clause stood: "And such officer shall act accordingly, until the disability be removed, or the period for choosing another President arrive;" and the latter words were then altered, so as to read, "*until a President shall be elected.*" Journ. of Convention, 361, 382.

³ Act of 1st March, 1792, ch. 8, § 11.

⁴ The Federalist, No. 73; 1 Kent's Comm. Lect. 13, p. 263.

examples in our own country of the intimidation or seduction of the executive by the terrors or allurements of the pecuniary arrangements of the legislative body.¹ The wisdom of this clause can scarcely be too highly commended. The legislature, on the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating upon his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.² The salary of the first President was fixed by Congress at the sum of twenty-five thousand dollars per annum, and of the Vice-President at five thousand dollars.³ And, to prevent any difficulty as to future Presidents, Congress, by a permanent act, a few years afterwards established the same compensation for all future Presidents and Vice-Presidents.⁴ (a) So that, unless some great changes should intervene, the independence of the executive is permanently secured by an adequate maintenance; and it can scarcely be diminished, unless some future executive shall basely betray his duty to his successor.

§ 1487. The next clause is, "Before he enters on the execution of his office, he shall take the following oath or affirmation: I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

§ 1488. There is little need of commentary upon this clause. No man can well doubt the propriety of placing a President of the United States under the most solemn obligations to preserve,

¹ The Federalist, No. 73; 1 Kent's Comm. Lect. 13, p. 263; 1 Tuck. Black. Comm. App. 323, 324.

² The Federalist, No. 73.

³ Act of 24th September, 1789, ch. 19.

⁴ Act of 18th of February, 1793, ch. 9.

(a) The salaries from the time of President Grant have been \$50,000 and \$10,000.

protect, and defend the Constitution. It is a suitable pledge of his fidelity and responsibility to his country; and creates upon his conscience a deep sense of duty, by an appeal, at once in the presence of God and man, to the most sacred and solemn sanctions which can operate upon the human mind.¹

¹ See Journal of Convention, 225, 296, 361, 383.

CHAPTER XXXVII.

EXECUTIVE — POWERS AND DUTIES.

§ 1489. HAVING thus considered the manner in which the executive department is organized, the next inquiry is as to the powers with which it is entrusted. These, and the corresponding duties, are enumerated in the second and third sections of the second article of the Constitution.

§ 1490. The first clause of the second section is, "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States.¹ He may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices. And he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

§ 1491. The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist when they are taken away from it.² Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.³ (a) Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.

¹ See Journal of Convention, 225, 295, 362, 383.

² 1 Kent's Comm. Lect. 13, p. 264; 3 Elliot's Deb. 103.

³ The Federalist, No. 74; 3 Elliot's Debates, 103.

(a) As commander-in-chief of the army and navy, the President may establish rules and regulations for their government; and the rules and orders made and issued by the Secretary of War and of the

Navy are to be considered as emanating from him. *United States v. Eliason*, 16 Pet. 291; *United States v. Freeman*, 3 How. 556.

Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. Timidity, indecision, obstinacy, and pride of opinion, must mingle in all such councils, and infuse a torpor and sluggishness, destructive of all military operations. Indeed, there would seem to be little reason to enforce the propriety of giving this power to the executive department (whatever may be its actual organization), since it is in exact coincidence with the provisions of our State constitutions; and therefore seems to be universally deemed safe, if not vital to the system.

§ 1492. Yet the clause did not wholly escape animadversion in the State conventions. The propriety of admitting the President to be commander-in-chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command.¹ The answer then given was, that though the President might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents.² But if his assuming the actual command depended upon the assent of Congress, what was to be done when an invasion or insurrection took place during the recess of Congress? Besides, the very power of restraint might be so employed as to cripple the executive department, when filled by a man of extraordinary military genius. The power of the President, too, might well be deemed safe; since he could not, of himself, declare war, raise armies, or call forth the militia, or appropriate money for the purpose; for these powers all belonged to Congress.³ In Great Britain, the king is not only commander-in-chief of the army and navy and militia, but he can declare war; and, in time of war, can raise armies and navies, and call forth the militia of his own mere will.⁴ So that, to use the words of Mr. Justice Blackstone, the sole supreme government and com-

¹ 2 Elliot's Debates, 865. See also 3 Elliot's Deb. 108.

² 2 Elliot's Debates, 366.

³ 3 Elliot's Debates, 103.

⁴ 3 Elliot's Debates, 103; 1 Black. Comm. 262, 408 to 421.

mand of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his majesty; and both houses or either house of Parliament cannot nor ought to pretend to the same.¹ The only power of check by Parliament is the refusal of supplies; and this is found to be abundantly sufficient to protect the nation against any war against the sense of the nation, or any serious abuse of the power in modern times.²

§ 1493. The next provision is as to the power of the President to require the opinions in writing of the heads of the executive departments. It has been remarked, that this is a mere redundancy, and the right would result from the very nature of the office.³ Still it is not without use, as it imposes a more strict responsibility, and recognizes a public duty of high importance and value in critical times. It has, in the progress of the government, been repeatedly acted upon; but by no President with more wisdom and propriety than by President Washington.⁴ (a)

¹ 1 Black. Comm. 262, 263.

² During the war with Great Britain in 1812, it was questioned whether the President could delegate his right to command the militia, by authorizing another officer to command them, when they were called into the public service. 8 Mass. Reports, 548, 550. If he cannot, this extraordinary result would follow, that if different detachments of militia were called out, he could not, except in person, command any of them; and if they were to act together, no officer could be appointed to command them in his absence. In the Pennsylvania insurrection, in 1794, President Washington called out the militia of the adjacent States of New Jersey, Maryland, and Virginia, as well as of Pennsylvania; and all the troops so called out acted under the orders of the governor of Virginia, on whom the President conferred the chief command during his absence. Rawle on the Const. ch. 20, p. 193. It was a practical affirmation of the authority, and was not contested. See also 5 Marshall's Life of Washington, ch. 8, pp. 580, 584, 588, 589.

³ The Federalist, No. 74. See Journal of Convention, 225, 326, 342.

⁴ Mr. Jefferson has informed us that, in Washington's administration, for measures of importance or difficulty a consultation was held with the heads of the departments, either assembled, or by taking their opinions separately, in conversation or in writing. In his own administration, he followed the practice of assembling the heads of departments, as a cabinet council. But he has added, that he thinks the course of requiring the separate opinion in writing of each head of a department is most strictly in the spirit of the Constitution; for the other does, in fact, transform the executive into a directory. 4 Jefferson's Corresp. 143, 144.

(a) The President speaks and acts through the heads of departments in reference to the business committed to them. *Wilcox v. Jackson*, 18 Pet. 498; *United*

States v. Cutler, 2 Curt. C. C. 617; *Lockington v. Smith*, Pet. C. C. 466. But Congress may impose independent duties upon the head of a department when not repug-

§ 1494. The next power is, "to grant reprieves and pardons." It has been said by the Marquis Beccaria, that the power of pardon does not exist under a perfect administration of the laws; and that the admission of the power is a tacit acknowledgment of the infirmity of the course of justice.¹ But if this be a defect at all, it arises from the infirmity of human nature generally; and, in this view, is no more objectionable than any other power of government; for every such power, in some sort, arises from human infirmity. But if it be meant, that it is an imperfection in human legislation to admit the power of pardon in any case, the proposition may well be denied, and some proof, at least, be required of its sober reality. The common argument is, that where punishments are mild, they ought to be certain; and that the clemency of the chief magistrate is a tacit disapprobation of the laws. But surely no man in his senses will contend that any system of laws can provide, for every possible shade of guilt, a proportionate degree of punishment. The most that ever has been and ever can be done, is to provide for the punishment of crimes by some general rules, and within some general limitations. The total exclusion of all power of pardon would necessarily introduce a very dangerous power in judges and juries, of following the spirit rather than the letter of the laws; or, out of

¹ Beccaria, ch. 46; 1 Kent's Comm. Lect. 13, p. 265; 4 Black. Comm. 307; 2 Wilson's Law Lect. 198 to 198.

nant to any rights secured by the Constitution. *Kendall v. United States*, 12 Pet. 524.

Mr. Jefferson's practice of holding cabinet meetings for the determination of all important questions of administration has been followed by the later Presidents; but there is no law requiring this, and each President will determine his own course. The cabinet, as a body of councillors, has no necessary place in our constitutional system; the President, and not the cabinet, is responsible for all the measures of the administration, and whatever is done by the head of a department is, in contemplation of law, done by the President through the proper executive agent. In this consists an important difference between the cabinet in the constitutional system of

Great Britain, and in our own. There, it is the cabinet that is responsible, and everything done by the King is supposed to be by their advice. A second difference is, that there is no "premier" in the American cabinet, though the Secretary of State has precedency of his associates by usage, and by statute in relation to the succession to the office of President in the case provided. *Ante*, § 1481, note. A third difference is, that the cabinet is not required to be in accord with Congress or with either house thereof, while in Great Britain they must be in harmony with the House of Commons on all important measures. A fourth difference is, that in America none of the members can have seats in the legislative body.

humanity, of suffering real offenders wholly to escape punishment; or else it must be holden (what no man will seriously avow) that the situation and circumstances of the offender, though they alter not the essence of the offence, ought to make no distinction in the punishment.¹ There are not only various gradations of guilt in the commission of the same crime, which are not susceptible of any previous enumeration and definition; but the proofs must, in many cases, be imperfect in their own nature, not only as to the actual commission of the offence, but also as to the aggravating or mitigating circumstances. In many cases, convictions must be founded upon presumptions and probabilities. Would it not be at once unjust and unreasonable to exclude all means of mitigating punishment, when subsequent inquiries should demonstrate that the accusation was wholly unfounded, or the crime greatly diminished in point of atrocity and aggravation, from what the evidence at the trial seemed to establish? A power to pardon seems, indeed, indispensable under the most correct administration of the law by human tribunals; since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and courts.² Besides, the law may be broken, and yet the offender be placed in such circumstances that he will stand, in a great measure, and perhaps wholly, excused in moral and general justice, though not in the strictness of the law. What then is to be done? Is he to be acquitted against the law; or convicted, and to suffer punishment infinitely beyond his deserts? If an arbitrary power is to be given to meet such cases, where can it be so properly lodged as in the executive department?³

§ 1495. Mr. Justice Blackstone says, that “in democracies

¹ 4 Black. Comm. 397.

² 1 Kent's Comm. Lect. 13, p. 265.

³ Mr. Chancellor Kent has placed the general reasoning in a just light. “Were it possible,” says he, “in every instance, to maintain a just proportion between the crime and the penalty, and were the rules of testimony and the mode of trial so perfect as to preclude mistake or injustice, there would be some color for the admission of this [Beccaria's] plausible theory. But even in that case policy would sometimes require a remission of a punishment strictly due for a crime certainly ascertained. The very notion of mercy implies the accuracy of the claims of justice.” 1 Kent's Comm. Lect. 13, p. 265. What should we say of a government, which purported to act upon mere human justice, excluding all operations of mercy in all cases? An inexorable government would scarcely be more praiseworthy than a despotism. It would be intolerable and unchristian.

this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This, as the President Montesquieu observes,¹ would oblige him very often to contradict himself, to make and unmake his decisions. It would tend to confound all ideas of right among the mass of the people, as they would find it difficult to tell whether a prisoner was discharged by his innocence or obtained a pardon through favor."² And hence he deduces the superiority of a monarchical government; because, in monarchies, the King acts in a superior sphere, and may, therefore, safely be trusted with the power of pardon, and it becomes a source of personal loyalty and affection.³

§ 1496. But surely this reasoning is extremely forced and artificial. In the first place, there is no more difficulty or absurdity in a democracy than in a monarchy in such cases, if the power of judging and pardoning be in the same hands; as if the monarch be at once the judge and the person who pardons. And Montesquieu's reasoning is, in fact, addressed to this very case of a monarch who is at once the judge and dispenser of pardons.⁴ In the next place, there is no inconsistency in a democracy, any more than in a monarchy, in intrusting one magistrate with a power to try the cause and another with a power to pardon. The one power is not incidental to, but in contrast with, the other. Nor if both powers were lodged in the same magistrate, would there be any danger of their being necessarily confounded; for they may be required to be acted upon separately, and at different times, so as to be known as distinct prerogatives. But, in point of fact, no such reasoning has the slightest application to the American governments, or indeed to any others where there is a separation of the general departments of government, legislative, judicial and executive, and the powers of each are administered by distinct persons. What difficulty is there in the people delegating the judicial power to one body of magistrates and the power of pardon to another, in a republic, any more than there is in the King's delegating the judicial power to magistrates and reserving the pardoning power to himself, in a monarchy?⁵

¹ Montesq. Spirit of Laws, B. 6, ch. 5.

² 4 Black. Comm. 397, 398.

³ 4 Black. Comm. 397, 398.

⁴ Montesq. B. 6, ch. 5.

⁵ Mr. Rawle's remarks upon this subject are peculiarly valuable, from their accuracy,

In truth, the learned author, in his extreme desire to recommend a kingly form of government, seems on this, as on many other occasions, to have been misled into the most loose and inconclusive statements. There is not a single State in the Union in which there is not, by its constitution, a power of pardon lodged in some one department of government, distinct from the judicial.¹ And the power of remitting penalties is, in some cases, even in England intrusted to judicial officers.²

§ 1497. So far from the power of pardon being incompatible with the fundamental principles of a republic, it may be boldly asserted to be peculiarly appropriate and safe in all free states; because the power can there be guarded by a just responsibility for its exercise.³ Little room will be left for favoritism, personal caprice, or personal resentment. If the power should ever be abused, it would be far less likely to occur in opposition than in obedience to the will of the people. The danger is not, that in republics the victims of the law will too often escape punishment by a pardon, but that the power will not be sufficiently exerted in cases where public feeling accompanies the prosecution, and assigns the ultimate doom to persons who have been convicted upon slender testimony or popular suspicions.

§ 1498. The power to pardon, then, being a fit one to be intrusted to all governments, humanity and sound policy dictate that this benign prerogative should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that, without an easy access to exceptions in favor of unfortunate guilt, justice would assume an aspect too sanguinary and cruel. The only question is, in what department of the government it can be most safely lodged; and that must principally refer to the executive or legislative department. The reasoning in favor of vesting it in the executive department may thus be stated. A sense of responsibility is always strongest in proportion as it is undivided. A single person would, therefore, be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the

philosophical spirit, and clearness of statement. Rawle on Const. ch. 17, pp. 174 to 177.

¹ 1 Tuck. Black. Comm. App. 331; 2 Wilson's Law Lect. 193 to 200.

² Bacon's Abridg. *Court of Exchequer*, B.

³ 1 Kent's Comm. Lect. 13, p. 266.

law; and the least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The consciousness that the life or happiness of an offender was exclusively within his discretion, would inspire scrupulousness and caution; and the dread of being accused of weakness or connivance would beget circumspection of a different sort. On the other hand, as men generally derive confidence from numbers, a large assembly might naturally encourage each other in acts of obduracy, as no one would feel much apprehension of public censure.¹ A public body, too, ordinarily engaged in other duties, would be little apt to sift cases of this sort thoroughly to the bottom, and would be disposed to yield to the solicitations or be guided by the prejudices of a few; and thus shelter their own acts, of yielding too much or too little, under the common apology of ignorance or confidence. A single magistrate would be compelled to search, and act upon his own responsibility; and, therefore, would be at once a more enlightened dispenser of mercy and a more firm administrator of public justice.

§ 1499. There are probably few persons now who would not consider the power of pardon, in ordinary cases, as best deposited with the President. But the expediency of vesting it in him in any cases, and especially in cases of treason, was doubted at the time of adopting the Constitution; and it was then urged, that it ought, at least in cases of treason, to be vested in one or both branches of the legislature.² That there are strong reasons which may be assigned in favor of vesting the power in Congress in cases of treason, need not be denied. As treason is a crime levelled at the immediate existence of society, when the laws have once ascertained the guilt of the offender, there would seem to be a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature.³ But there are strong reasons also against it. Even in such cases, a single magistrate of prudence and sound sense would be better fitted than a numerous assembly, in such delicate conjunctures, to weigh the motives for and against the remission of the punishment, and to ascertain all the facts without undue influence. The responsibility would be more felt and more direct. Treason,

¹ The Federalist, No. 74. See 2 Wilson's Law Lect. 198 to 200.

² 2 Elliot's Debates, 366; The Federalist, No. 74.

³ The Federalist, No. 74.

too, is a crime that will often be connected with seditions, embracing a large portion of a particular community; and might, under such circumstances, and especially where parties were nearly poised, find friends and favorites, as well as enemies and opponents, in the councils of the nation.¹ So that the chance of an impartial judgment might be less probable in such bodies than in a single person at the head of the nation.

§ 1500. A still more satisfactory reason is, that the legislature is not always in session, and that their proceedings must be necessarily slow, and are generally not completed until after long delays. The inexpediency of deferring the execution of any criminal sentence, until a long and indefinite time after a conviction, is felt in all communities. It destroys one of the best effects of punishment,—that which arises from a prompt and certain administration of justice following close upon the offence. If the legislature is invested with the authority to pardon, it is obviously indispensable that no sentence can be properly executed, at least in capital cases, until they have had time to act. And a mere postponement of the subject, from session to session, would be naturally sought by all those who favored the convict, and yet doubted the success of his application. In many cases delay would be equivalent to a pardon, as to its influence upon public opinion, either in weakening the detestation of the crime or encouraging the commission of it. But the principal argument for reposing the power of pardon in the executive magistrate, in cases of treason, is, that in seasons of insurrection or rebellion there are critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and if these are suffered to pass unimproved, it may be impossible afterwards to interpose with the same success. The dilatory process of convening the legislature, or one of the branches, for the purpose of sanctioning such a measure, would frequently be the loss of the golden opportunity. The loss of a week, of a day, or even of an hour, may sometimes prove fatal. If a discretionary power were confided to the President, to act in such emergencies, it would greatly diminish the importance of the restriction. And it would generally be impolitic to hold out, either by the Constitution or by law, a prospect of impunity, by confiding the exercise of the power to the executive in

¹ The Federalist, No. 74. Rawle on Const. ch. 17, p. 178.

special cases; since it might be construed into an argument of timidity or weakness, and thus have a tendency to embolden guilt.¹ In point of fact, the power has always been found safe in the hands of the State executives, in treason as well as in other cases; and there can be no practical reason why it should not be equally safe with the executive of the Union.²

§ 1501. There is an exception to the power of pardon, that it shall not extend to cases of impeachment, which takes from the President every temptation to abuse it in cases of political and official offences by persons in the public service. The power of impeachment will generally be applied to persons holding high offices under the government; and it is of great consequence, that the President should not have the power of preventing a thorough investigation of their conduct, or of securing them against the disgrace of a public conviction by impeachment, if they should deserve it. The Constitution has, therefore, wisely interposed this check upon his power, so that he cannot, by any corrupt coalition with favorites, or dependents in high offices, screen them from punishment.³

§ 1502. In England (from which this exception was probably borrowed), no pardon can be pleaded in bar of an impeachment. But the king may, after conviction upon an impeachment, pardon the offender. His prerogative, therefore, cannot prevent the disgrace of a conviction; but it may avert its effects, and restore the offender to his credit.⁴ The President possesses no such power in any case of impeachment; and, as the judgment upon a conviction extends no further than to a removal from office and disqualification to hold office, there is not the same reason for its exercise after conviction, as there is in England; since, as we have seen, the judgment there, so that it does not exceed what is allowed by law, lies wholly in the breast of the House of Lords, as to its nature and extent, and may in many cases not only reach the life, but the whole fortune of the offender.

§ 1503. It would seem to result from the principle on which the power of each branch of the legislature to punish for con-

¹ The Federalist, No. 74; 3 Elliot's Debates, 105, 106, 107.

² The Federalist, No. 64; 3 Elliot's Debates, 105, 106; 1 Tuck. Black. Comm. App. 331.

³ 1 Kent's Comm. Lect. 13, p. 266.

⁴ 1 Tuck. Black. Comm. App. 331, 332; 4 Black. Comm. 399, 400. See also Rawls on Const. ch. 17, p. 176; ch. 31, pp. 293, 294.

tempts is founded, that the executive authority cannot interpose between them and the offender. The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all of their duties. If they can be overawed by force, or corrupted by largesses, or interrupted in their proceedings by violence, without the means of self-protection, it is obvious that they will soon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good-will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people intrusted to them would be placed in perpetual jeopardy. The Constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempt. The latter arises by implication; and to make it effectual, the former is excluded by implication.¹

§ 1504. Subject to these exceptions (and perhaps there may be others of a like nature standing on special grounds), the power of pardon is general and unqualified, reaching from the highest to the lowest offences. (a) The power of remission of fines, penalties, and forfeitures is also included in it; and may in the last resort be exercised by the executive, although it is in many cases by our laws confided to the treasury department.² No law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases.³ (b)

¹ Rawle on the Constitution, ch. 17, p. 177.

² Act of 3d of March, 1797, ch. 77; Act of 11th of Feb. 1800, ch. 6.

³ Instances of the exercise of this power by the President, in remitting fines and penalties, in cases not within the scope of the laws giving authority to the treasury department, have repeatedly occurred; and their obligatory force has never been questioned.

(a) It also includes the power of a conditional pardon, such as commuting the punishment of death into imprisonment for life. *Ex parte Wells*, 18 How. 307.

(b) A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is free, it releases the punishment and blots out of existence the guilt, so that in

the eye of the law the offender is as innocent as if he had never committed the offence. *Ex parte Garland*, 4 Wall. 380. And where property has been seized under a statute for the confiscation of property employed with the owner's consent in aid of rebellion, a subsequent pardon will relieve the owner from a forfeiture. *Armstrong's Foundry*, 6 Wall. 766. Congress cannot limit or impose restrictions upon

§ 1505. The next clause is, "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur. And he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

§ 1506. The first power, "to make treaties," was not in the original draft of the Constitution; but was afterwards reported by a committee, and after some ineffectual attempts to amend it was adopted in substance as it now stands, except that in the report the advice and consent of two-thirds of the senators was not required to a treaty of peace. This exception was struck out by a vote of eight States against three. The principal struggle was, to require two-thirds of the whole number of members of the Senate instead of two-thirds of those present.¹

§ 1507. Under the confederation, Congress possessed the sole and exclusive power of "entering into treaties and alliances, provided, that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people were subjected to; or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." But no treaty or alliance could be entered into, unless by the assent of nine of the States.² These limitations upon the power were found very inconvenient in practice; and indeed, in conjunction with other defects, contributed to the prostration and utter imbecility of the confederation.³

§ 1508. The power "to make treaties" is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succors; for

¹ Journal of Convention, pp. 225, 326, 339, 341, 342, 343, 362; The Federalist, No. 75.

² Confederation, Art. 9.

³ The Federalist, No. 42.

the President's power to pardon. United States v. Klein, 13 Wall. 128; Armstrong v. United States, Id. 156.

indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other.¹ But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions.² Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the government, will remain to be considered whenever the exigency shall arise.³

§ 1509. The power of making treaties is indispensable to the due exercise of national sovereignty, and very important, especially as it relates to war, peace, and commerce. That it should belong to the national government would seem to be irresistibly established by every argument deduced from experience, from public policy, and a close survey of the objects of government. It is difficult to circumscribe the power within any definite limits applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes. The Constitution has, therefore, made it general and unqualified. This very circumstance, however, renders it highly important that it should be delegated in such a mode, and with such precautions, as will

¹ See 5 Marshall's Life of Washington, ch. 8, pp. 650 to 659.

² See Woodeson's Elem. of Jurisp. p. 51.

³ See 1 Tuck. Black. Comm. App. 332, 333; Rawle on Const. ch. 7, pp. 63 to 76; 2 Elliot's Deb. 368, 369 to 379; Journal of Convention, p. 342; 4 Jefferson's Corresp. 2, 3. Mr. Jefferson seems at one time to have thought that the Constitution only meant to authorize the President and Senate to carry into effect, by way of treaty, *any power they might constitutionally exercise*. At the same time, he admits that he was sensible of the weak points of this position. 4 Jefferson's Corresp. 493. What are such powers given to the President and Senate? Could they make appointments by treaty?

afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.¹ With such views, the question was naturally presented in the convention, to what body shall it be delegated? It might be delegated to Congress generally, as it was under the confederation, exclusive of the President, or in conjunction with him. It might be delegated to either branch of the legislature, exclusive of, or in conjunction with him. Or it might be exclusively delegated to the President.

§ 1510. In the formation of treaties, secrecy and immediate despatch are generally requisite, and sometimes absolutely indispensable. Intelligence may often be obtained, and measures matured in secrecy, which could never be done, unless in the faith and confidence of profound secrecy. No man at all acquainted with diplomacy but must have felt that the success of negotiations as often depends upon their being unknown by the public as upon their justice or their policy. Men will assume responsibility in private, and communicate information, and express opinions, which they would feel the greatest repugnance publicly to avow; and measures may be defeated by the intrigues and management of foreign powers, if they suspect them to be in progress, and understand their precise nature and extent. In this view the executive department is a far better depository of the power than Congress would be. The delays incident to a large assembly; the differences of opinion; the time consumed in debate; and the utter impossibility of secrecy, all combine to render them unfitted for the purposes of diplomacy. And our own experience during the confederation abundantly demonstrated all the evils which the theory would lead us to expect.² Besides, there are tides in national affairs, as well as in the affairs of private life. To discern and profit by them is the part of true political wisdom; and the loss of a week, or even of a day, may sometimes change the whole aspect of affairs, and render negotiations wholly nugatory or indecisive. The loss of a battle, the death of a prince, the removal of a minister, the pressure or removal of fiscal embarrassments at the moment, and other circumstances, may change the whole posture of affairs, and insure success, or defeat the best concerted project.³ The executive, having a constant eye upon foreign affairs, can promptly

¹ The Federalist, No. 64.

² Ibid.

³ Ibid.

meet, and even anticipate such emergencies, and avail himself of all the advantages accruing from them; while a large assembly would be coldly deliberating on the chances of success, and the policy of opening negotiations. It is manifest, then, that Congress would not be a suitable depositary of the power.

§ 1511. The same difficulties would occur from confiding it exclusively to either branch of Congress. Each is too numerous for prompt and immediate action and secrecy. The matters in negotiations, which usually require these qualities in the highest degree, are the preparatory and auxiliary measures; and which are to be seized upon, as it were, in an instant. The President could easily arrange them. But the House, or the Senate, if in session, could not act, until after great delays; and in the recess could not act at all. To have intrusted the power to either would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true, that the branch so intrusted might have the option to employ the President in that capacity; but they would also have the option of refraining from it; and it cannot be disguised, that pique, or cabal, or personal or political hostility, might induce them to keep their pursuits at a distance from his inspection and participation. Nor could it be expected that the President, as a mere ministerial agent of such branch, would enjoy the confidence and respect of foreign powers to the same extent as he would as the constitutional representative of the nation itself; and his interposition would of course have less efficacy and weight.¹

§ 1512. On the other hand, considering the delicacy and extent of the power, it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. In England, the power to make treaties is exclusively vested in the crown.² But however proper it may be in a monarchy, there is no American statesman but must feel that such a prerogative in an American President would be inexpedient and dangerous.³ It would be inconsistent with that wholesome jealousy which all republics ought to cherish, of all depositaries of power; and which, experience teaches us, is the

¹ The Federalist, No. 75.

² 1 Black. Comm. 257; The Federalist, No. 69.

³ The Federalist, No. 75.

best security against the abuse of it.¹ The check which acts upon the mind, from the consideration that what is done is but preliminary, and requires the assent of other independent minds to give it a legal conclusiveness, is a restraint which awakens caution, and compels to deliberation.

§ 1513. The plan of the Constitution is happily adapted to attain all just objects in relation to foreign negotiations. While it confides the power to the executive department, it guards it from serious abuse by placing it under the ultimate superintendence of a select body of high character and high responsibility. It is indeed clear to a demonstration, that this joint possession of the power affords a greater security for its just exercise than the separate possession of it by either.² The President is the immediate author and finisher of all treaties; and all the advantages which can be derived from talents, information, integrity, and deliberate investigation on the one hand, and from secrecy and despatch on the other, are thus combined in the system.³ But no treaty, so formed, becomes binding upon the country, unless it receives the deliberate assent of two-thirds of the Senate. In that body all the States are equally represented; and, from the nature of the appointment and duration of the office, it may fairly be presumed at all times to contain a very large portion of talents, experience, political wisdom, and sincere patriotism, a spirit of liberality, and a deep devotion to all the substantial interests of the country. The constitutional check of requiring two-thirds to confirm a treaty is, of itself, a sufficient guaranty against any wanton sacrifice of private rights, or any betrayal of public privileges. To suppose otherwise would be to suppose that a representative republican government was a mere phantom; that the State legislatures were incapable or unwilling to choose senators possessing due qualifications; and that the people would voluntarily confide power to those who were ready to promote their ruin, and endanger or destroy their liberties. Without supposing a case of utter indifference or utter corruption in the people, it would be impossible that the Senate should be so constituted at any time, as that the honor and interests of the country would not be safe in their hands. When such an indifference or corruption shall have arrived, it will be in vain to prescribe any remedy; for the Constitution will have crumbled into ruins,

¹ The Federalist, No. 75.

² Ibid.

³ Id. No. 64.

or have become a mere shadow, about which it would be absurd to disquiet ourselves.¹

§ 1514. Although the propriety of this delegation of the power seems, upon sound reasoning, to be incontestable, yet few parts of the Constitution were assailed with more vehemence.² (a) One ground of objection was, the trite topic of an intermixture of the executive and legislative powers; some contending, that the President ought alone to possess the prerogative of making treaties; and others, that it ought to be exclusively deposited in the Senate. Another objection was, the smallness of the number of the persons to whom the power was confided; some being of opinion that the House of Representatives ought to be associated in its exercise; and others, that two-thirds of all the members of the Senate, and not two-thirds of all the members present, should be required to ratify a treaty.³

§ 1515. In relation to the objection, that the power ought to have been confided exclusively to the President, it may be suggested, in addition to the preceding remarks, that, however safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an executive magistrate chosen for four years. It has been remarked, and is unquestionably true, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of corruption by foreign powers, so as to surrender any important rights or interests. But a man, raised from a private station to the rank of chief magistrate for a short period, having but a slender or moderate fortune, and no very deep stake in the society, might sometimes be under temptations to sacrifice duty to interest, which it would require great virtue to withstand. If ambitious, he might be tempted to seek his own aggrandizement by the aid of a foreign power, and use the field of

¹ The Federalist, No. 64.

² See 2 Elliot's Debates, 367 to 379.

³ The Federalist, No. 75.

(a) Another objection was that under this power the President and one house of the legislature would be enabled to make laws for the country covering a great many subjects without the consent of the other

house. See Life and Correspondence of James Iredell, II. 202.

As to the binding force of treaties, see chap. LXII., and notes.

negotiations for this purpose. If avaricious, he might make his treachery to his constituents a vendible article at an enormous price. Although such occurrences are not ordinarily to be expected, yet the history of human conduct does not warrant that exalted opinion of human nature, which would make it wise in a nation to commit its most delicate interests and momentous concerns to the unrestrained disposal of a single magistrate.¹ It is far more wise to interpose checks upon the actual exercise of the power, than remedies to redress or punish an abuse of it.

§ 1516. The impropriety of delegating the power exclusively to the Senate has been already sufficiently considered. And, in addition to what has been already urged against the participation of the House of Representatives in it, it may be remarked that the House of Representatives is for other reasons far less fit than the Senate to be the exclusive depositary of the power, or to hold it in conjunction with the executive. In the first place, it is a popular assembly, chosen immediately from the people, and representing, in a good measure, their feelings and local interests; and it will on this account be more likely to be swayed by such feelings and interests than the Senate, chosen by the States through the voice of the State legislatures. In the next place, the House of Representatives are chosen for two years only; and the internal composition of the body is constantly changing, so as to admit of less certainty in their opinions and their measures than would naturally belong to a body of longer duration. In the next place, the House of Representatives is far more numerous than the Senate, and will be constantly increasing in numbers, so that it will be more slow in its movements, and more fluctuating in its councils. In the next place, the Senate will naturally be composed of persons of more experience, weight of character, and talents, than the members of the House. Accurate knowledge of foreign politics, a steady and systematic adherence to the same views, nice and uniform sensibility to national character, as well as secrecy, decision, and despatch, are required for a due execution of the power to make treaties. And, if these are not utterly incompatible with the genius of a numerous and variable body, it must be admitted that they will be more rarely found there than in a more select body, having a longer duration in

¹ The Federalist, No. 75.

office, and representing, not the interests of private constituents alone, but the sovereignty of States.

§ 1517. Besides, the very habits of business, and the uniformity and regularity of system, acquired by a long possession of office, are of great concern in all cases of this sort. The senators, from the longer duration of their office, will have great opportunities of extending their political information, and of rendering their experience more and more beneficial to their country. The members are slowly changed, so that the body will at all times, from its very organization, comprehend a large majority of persons who have been engaged for a considerable time in public duties and foreign affairs. If, in addition to all these reasons, it is considered, that in the Senate all the States are equally represented, and in the House very unequally, there can be no reasonable doubt, that the Senate is in all respects a more competent and more suitable depositary of the power than the House, either with or without the co-operation of the executive. And most of the reasoning applies with equal force to any participation by the House in the treaty-making functions. It would add an unwieldy machinery to all foreign operations, and retard, if not wholly prevent, the beneficial purposes of the power.¹ Yet such a scheme has not been without warm advocates. And it has been thought an anomaly, that, while the power to make war was confided to both branches of Congress, the power to make peace was within the reach of one, with the co-operation of the President.²

§ 1518. But there will be found no inconsistency or inconvenience in this diversity of power. Considering the vast expenditures and calamities with which war is attended, there is certainly the strongest ground for confiding it to the collected wisdom of the national councils. It requires one party only to declare war; but it requires the co-operation and consent of both belligerents to make peace. No negotiations are necessary in the former case; in the latter, they are indispensable. Every reason, therefore, for intrusting the treaty-making power to the President and Senate in common negotiations, applies, *a fortiori*, to a treaty

¹ The Federalist, Nos. 64, 75. In the convention, a proposition was made to add the House to the Senate, in advising and consenting to treaties. But it was rejected by the vote of ten States against one. Journal of Convention, 339, 340.

² 1 Tuck. Black. Comm. App. 338, 339.

of peace. Indeed, peace is so important to the welfare of a republic, and so suited to all its truest interests as well as to its liberties, that it can scarcely be made too facile. While, on the other hand, war is at all times so great an evil, that it can scarcely be made too difficult. The power to make peace can never be unsafe for the nation in the hands of the President and two-thirds of the Senate. The power to prevent it may not be without hazard in the hands of the House of Representatives, who may be too much under the control of popular excitement or legislative rivalry to act at all times with the same degree of impartiality and caution. In the convention, a proposition to except treaties of peace from the treaty-making power was, at one time, inserted, but was afterwards deliberately abandoned.¹

§ 1519. In regard to the objection, that the arrangement is a violation of the fundamental rule that the legislative and executive departments ought to be kept separate, it might be sufficient to advert to the considerations stated in another place, which show that the true sense of the rule does not require a total separation.² But in truth, the nature of the power of making treaties indicates a peculiar propriety in the union of the executive and the Senate in the exercise of it. Though some writers on government place this power in the class of executive authorities, yet it is an arbitrary classification; and, if attention is given to its operation, it will be found to partake more of the legislative than of the executive character. The essence of legislation is to prescribe laws or regulations for society; while the execution of those laws and regulations, and the employment of the common strength, either for that purpose or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of subsisting laws, nor to the enactment of new ones; and still less does it relate to the exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law with us, but, as to the foreign sovereigns, have only the obligation of good faith. Treaties are not rules prescribed by the sovereign to his subjects; but agreements between sovereign and sovereign. The treaty-making power, therefore, seems to form a distinct

¹ Journal of Convention, 226, 325, 326, 341, 342.

² See vol. i. § 525 *et seq.*

department, and to belong, properly, neither to the legislature nor the executive, though it may be said to partake of the qualities common to each. The President, from his unity, promptitude, and facility of action, is peculiarly well adapted to carry on the initiative processes; while the Senate, representing all the States, and engaged in legislating for the interests of the whole country, is equally well fitted to be intrusted with the power of ultimate ratification.¹

§ 1520. The other objection, which would require a concurrence of two-thirds of all the members of the Senate, and not merely of two-thirds of all present, is not better founded.² All provisions which require more than a majority of any body to its resolutions, have, as has been already intimated, a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration ought never to be lost sight of; and very strong reasons ought to exist to justify any departure from the ordinary rule, that the majority ought to govern. The Constitution has, on this point, gone as far in the endeavor to secure the advantage of numbers in the formation of treaties, as can be reconciled either with the activity of the public councils or with a reasonable regard to the sense of the major part of the community. If two-thirds of the whole number of members had been required, it would, in many cases, from a non-attendance of a part, amount in practice to a necessity almost of unanimity. The history of every political establishment, in which such a principle has prevailed, is a history of impotence, perplexity, and disorder. Proofs of this position may be easily adduced from the examples of the Roman tribuneship, the Polish diet, and the States-general of the Netherlands, and even from our own experience under the confederation.³ Under the latter instrument, the concurrence of nine States was necessary, not only to making treaties, but to many other acts of a less important character; and measures were often defeated by the non-attendance of members, sometimes by design and sometimes by accident.⁴ It is hardly possible that a treaty could be ratified by surprise, or taking advantage of the accidental absence of a few members; and certainly the motive to punctuality in attendance

¹ The Federalist, No. 75.

² 2 Elliot's Debates, 367 to 379.

³ The Federalist, No. 75; Id. No. 22.

⁴ Ibid. and 1 Elliot's Debates, 44, 45.

will be greatly increased by making such ratification to depend upon the numbers present.¹

§ 1521. The Federalist has taken notice of the differences between the treaty-making power in England and that in America, in the following terms: "The President is to have power, with the advice and consent of the Senate, to make treaties, provided two-thirds of the members present concur. The King of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can, of his own accord, make treaties of peace, commerce, alliance, and of every other description. It has been insinuated that his authority, in this respect, is not conclusive; and that his conventions with foreign powers are subject to the revision and stand in need of the ratification of Parliament. But I believe this doctrine was never heard of till it was broached upon the present occasion. Every jurist of that kingdom, and every other man acquainted with its constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown, in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws, to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause; from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British

¹ The Federalist, Nos. 22, 75; 2 Elliot's Debates, 368. In the convention, a proposition to require the assent of two-thirds of all the members of the Senate was rejected by the vote of eight States against three. Another, to require that no treaty shall be made unless two-thirds of the whole number of senators were present, was also rejected by the vote of six States against five. Another, to require a majority of all the members of the Senate to make a treaty, was also rejected by the vote of six States against five. Another, to require that all the members should be summoned, and have time to attend, shared a like fate, by the vote of eight States against three. Journal of Convention, 343, 344.

sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature. It must be admitted that, in this instance, the power of the federal executive would exceed that of any State executive. But this arises naturally from the exclusive possession, by the Union, of that part of the sovereign power which relates to treaties. If the confederacy were to be dissolved, it would become a question whether the executives of the several States were not solely invested with that delicate and important prerogative."¹

§ 1522. Upon the whole, it is difficult to perceive how the treaty-making power could have been better deposited, with a view to its safety and efficiency. Yet it was declaimed against with uncommon energy, as dangerous to the commonwealth, and subversive of public liberty.² Time has demonstrated the fallacy of such prophecies, and has confirmed the belief of the friends of the Constitution, that it would be not only safe, but full of wisdom and sound policy. Perhaps no stronger illustration than this can be found, of the facility of suggesting ingenious objections to any system calculated to create public alarm, and to wound public confidence, which, at the same time, are unfounded in human experience or in just reasoning.

§ 1523. Some doubts appear to have been entertained in the early stages of the government, as to the correct exposition of the Constitution in regard to the agency of the Senate in the formation of treaties. The question was, whether the agency of the Senate was admissible previous to the negotiation, so as to advise on the instructions to be given to the ministers, or was limited to the exercise of the power of advice and consent, after the treaty was formed; or whether the President possessed an option to adopt one mode or the other, as his judgment might direct.³ The practical exposition assumed on the first occasion which seems to have occurred in President Washington's administration, was, that the option belonged to the executive to adopt either mode, and the Senate might advise before, as well as after, the formation of a treaty.⁴ Since that period, the Senate have been rarely if ever consulted, until after a treaty has been com-

¹ See also the opinion of Iredell, J., in *Ware v. Hylton*, 3 Dall. 272 to 276.

² 2 Elliot's Debates, 367 to 379.

³ 5 Marshall's Life of Washington, ch. 2, p. 223.

⁴ Executive Journal, 11th August, 1790, pp. 60, 61.

pleted, and laid before them for ratification.¹(a) When so laid before the Senate, that body is in the habit of deliberating upon it, as, indeed, it does on all *executive* business, in secret, and with closed doors. The Senate may wholly reject the treaty, or advise and consent to a ratification of part of the articles, rejecting others, or recommend additional or explanatory articles. In the event of a partial ratification, the treaty does not become the law of the land until the President and the foreign sovereign have each assented to the modifications proposed by the Senate.² But, although the President may ask the advice and consent of the Senate to a treaty, he is not absolutely bound by it; for he may, after it is given, still constitutionally refuse to ratify it. Such an occurrence will probably be rare, because the President will scarcely incline to lay a treaty before the Senate, which he is not disposed to ratify.³(b)

¹ Rawle on Const. ch. 7, p. 63.

² Rawle on Const. ch. 7, pp. 63, 64. Before the ratifications of treaties, it is common for the Senate to require, and for the President to lay before them, all the official documents respecting the negotiations, to assist their judgment. But the House of Representatives have no constitutional right to insist on the production of them; and it is matter of discretion with the President, whether to comply or not with the demand of the House, which is but in the nature of a request. In the case of the British treaty of 1794, President Washington refused to lay the papers before the House of Representatives, when requested by them so to do. See his Message, 24th of March, 1796; 1 Tuck. Black. Comm. App. 334; 5 Marshall's Life of Washington, ch. 8, p. 654; 4 Jefferson's Corresp. 464, 465; Rawle on Const. ch. 16, p. 171.

In the early part of President Washington's administration, he occasionally met the Senate in person, to confer with them on the executive business confided to them by the Constitution. But this practice was found very inconvenient, and was soon abandoned. In June, 1813, the Senate appointed a committee to hold a conference with President Madison, respecting his nomination of a minister to Sweden, then before them for ratification. But he declined it, considering that it was incompatible with the due relations between the executive and other departments of the government. Sergeant on Const. ch. 31 (2d edition), p. 371; 5 Niles's Register, 243, 290; Id. 276, 340; 2 Executive Journal, 354, 381, 382. See also 2 Executive Journal, 353, 354, 388, 389. It is believed that the practice has been ever since abandoned.

Mr. Jefferson and the cabinet (with the exception of Mr. Hamilton) in President Washington's administration, seem to have been of opinion that neither branch of the legislature had a right to call upon the heads of departments, except through calls on the President, for information or papers. 4 Jefferson's Corresp. 463, 464, 465. The practice has, however, of late years settled down in favor of making direct calls on the heads of the departments. Rawle on Const. ch. 16, pp. 171, 172.

³ Rawle on Const. ch. 20, pp. 194, 195; 4 Jefferson's Corresp. 317, 318.

(a) A conspicuous exception was the treaty of 1846, settling the Oregon boundary.

(b) A treaty may be superseded by a

subsequent act of Congress. Gray v. Clinton Bridge, 1 Woolw. 150; United States v. Tobacco Factory, 1 Dillon, 264; The Cherokee Tobacco, 11 Wall. 616.

§ 1524. The next part of the clause respects appointments to office. The President is to nominate, and by and with the advice and consent of the Senate to appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and other officers whose appointments are not otherwise provided for.

§ 1525. Under the confederation, an exclusive power was given to Congress of "sending and receiving ambassadors."¹ The term "ambassador," strictly construed (as would seem to be required by the second article of that instrument), comprehends the highest grade only of public ministers;² and excludes those grades which the United States would be most likely to prefer whenever foreign embassies may be necessary. But under no latitude of construction could the term "ambassadors" comprehend consuls. Yet it was found necessary by Congress to employ the inferior grades of ministers, and to send and receive consuls. It is true, that the mutual appointment of consuls might have been provided for by treaty; and where no treaty existed, Congress might perhaps have had the authority under the ninth article of the confederation, which conferred a general authority to appoint officers for managing the general affairs of the United States. But the admission of foreign consuls into the United States, when not stipulated for by treaty, was nowhere provided for.³ The whole subject was full of embarrassment and constitutional doubts; and the provision in the Constitution, extending the appointment to other public ministers and consuls as well as to ambassadors, is a decided improvement upon the confederation.

§ 1526. In the first draft of the Constitution, the power was given to the President to appoint officers in all cases not otherwise provided for by the Constitution; and the advice and consent of the Senate was not required.⁴ But, in the same draft, the power to appoint ambassadors and judges of the Supreme Court was given to the Senate.⁵ The advice and consent of the Senate, and the appointment by the President of ambassadors and ministers, consuls and judges of the Supreme Court, was

¹ Article 9.

² An enumeration of the various grades and powers of foreign ministers properly belongs to a treatise on public law. The learned reader, however, will find ample information in the treatises of Grotius, Vattel, Martens, and Wicquefort.

³ The Federalist, No. 42.

⁴ Journ. of Convention, p. 225.

⁵ *Id.* 223.

afterwards reported by a committee as an amendment, and was unanimously adopted.¹

§ 1527. The mode of appointment to office pointed out by the Constitution seems entitled to peculiar commendation. There are several ways in which, in ordinary cases, the power may be vested. It may be confided to Congress, or to one branch of the legislature, or to the executive alone, or to the executive in concurrence with any selected branch. The exercise of it by the people at large will readily be admitted, by all considerate statesmen, to be impracticable, and therefore need not be examined. The suggestions already made upon the treaty-making power, and the inconveniences of vesting it in Congress, apply with great force to that of vesting the power of appointment to office in the same body. It would enable candidates for office to introduce all sorts of cabals, intrigues, and coalitions into Congress; and not only distract their attention from their proper legislative duties, but probably, in a very high degree, influence all legislative measures. A new source of division and corruption would thus be infused into the public councils, stimulated by private interests and pressed by personal solicitations. What would be (to be) done, in case the Senate and House should disagree in an appointment? Are they to vote in convention or as distinct bodies? There would be practical difficulties attending both courses; and experience has not justified the belief that either would conduce either to good appointments or to due responsibility.²

§ 1528. The same reasoning would apply to vesting the power exclusively in either branch of the legislature. It would make the patronage of the government subservient to private interests, and bring into suspicion the motives and conduct of members of the appointing body. There would be great danger that the elections at the polls might be materially influenced by this power to confer or to withhold favors of this sort.³

§ 1529. Those who are accustomed to profound reflection upon the human character and human experience will readily adopt the opinion that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices

¹ Journ. of Convention, pp. 325, 326, 340, 362.

² See the Federalist, Nos. 76, 77.

³ Ibid.

than any body of men of equal or even of superior discernment.¹ His sole and undivided responsibility will naturally beget a livelier sense of duty and a more exact regard to reputation. He will inquire with more earnestness and decide with more impartiality. He will have fewer personal attachments to gratify than a body of men; and will be less liable to be misled by his private friendships and affections; or at all events, his conduct will be more open to scrutiny, and less liable to be misunderstood. If he ventures upon a system of favoritism he will not escape censure, and can scarcely avoid public detection and disgrace. But in a public body appointments will be materially influenced by party attachments and dislikes, by private animosities, and antipathies, and partialities, and will be generally founded in compromises, having little to do with the merit of candidates, and much to do with the selfish interests of individuals and cabals. They will be too much governed by local, or sectional, or party arrangements.² A President chosen from the nation at large may well be presumed to possess high intelligence, integrity, and sense of character. He will be compelled to consult public opinion in the most important appointments; and must be interested to vindicate the propriety of his appointments by selections from those whose qualifications are unquestioned and unquestionable. If he should act otherwise, and surrender the public patronage into the hands of profligate men or low adventurers, it will be impossible for him long to retain public favor. Nothing — no, not even the whole influence of party — could long screen him from the just indignation of the people. Though slow, the ultimate award of popular opinion would stamp upon his conduct its merited infamy. No President, however weak or credulous (if such a person could ever, under any conjuncture of circumstances, obtain the office), would fail to perceive or to act upon admonitions of this sort. At all events, he would be less likely to disregard them than a large body of men, who would share the responsibility and encourage each other in the division of the patronage of the government.

§ 1530. But though these general considerations might easily reconcile us to the choice of vesting the power of appointment exclusively in the President, in preference to the Senate or House

¹ The Federalist, No. 76 ; 2 Wilson's Law Lect. 191, 192.

² The Federalist, No. 76.

of Representatives alone, the patronage of the government and the appointments to office are too important to the public welfare not to induce great hesitation in vesting them exclusively in the President. The power may be abused; and assuredly it will be abused, except in the hands of an executive of great firmness, independence, integrity, and public spirit. It should never be forgotten, that in a republican government offices are established and are to be filled, not to gratify private interests and private attachments; not as a means of corrupt influence or individual profit; not for cringing favorites or court sycophants; but for purposes of the highest public good, to give dignity, strength, purity, and energy to the administration of the laws. It would not, therefore, be a wise course to omit any precaution, which, at the same time that it should give to the President a power over the appointments of those who are in conjunction with himself to execute the laws, should also interpose a salutary check upon its abuse, acting by way of preventive as well as of remedy.

§ 1531. Happily this difficult task has been achieved by the Constitution. The President is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the Senate. His responsibility and theirs is thus complete and distinct. He can never be compelled to yield to their appointment of a man unfit for office; and, on the other hand, they may withhold their advice and consent from any candidate who, in their judgment, does not possess due qualifications for office. Thus, no serious abuse of the power can take place without the co-operation of two co-ordinate branches of the government acting in distinct spheres; and if there should be any improper concession on either side, it is obvious that, from the structure and changes incident to each department, the evil cannot long endure, and will be remedied, as it should be, by the elective franchise. The consciousness of this check will make the President more circumspect and deliberate in his nominations for office. He will feel that, in case of a disagreement of opinion with the Senate, his principal vindication must depend upon the unexceptionable character of his nomination. And in case of a rejection, the most that can be said is, that he had not his first choice. He will still have a wide range of selection; and his responsibility to present another

candidate, entirely qualified for the office, will be complete and unquestionable.

§ 1532. Nor is it to be expected that the Senate will ordinarily fail of ratifying the appointment of a suitable person for the office. Independent of the desire which such a body may naturally be presumed to feel, of having offices suitably filled (when they cannot make the appointment themselves), there will be a responsibility to public opinion for a rejection, which will overcome all common private wishes. Cases, indeed, may be imagined, in which the Senate, from party motives, from a spirit of opposition, and even from motives of a more private nature, may reject a nomination absolutely unexceptionable. But such occurrences will be rare. The more common error (if there shall be any) will be too great a facility to yield to the executive wishes, as a means of personal or popular favor. A President will rarely want means, if he shall choose to use them, to induce some members of such a body to aid his nominations; since a correspondent influence may be fairly presumed to exist to gratify such persons in other recommendations for office, and thus to make them indirectly the dispensers of local patronage. It will be principally with regard to high officers, such as ambassadors, judges, heads of departments, and other appointments of great public importance, that the Senate will interpose to prevent an unsuitable choice. Their own dignity and sense of character, their duty to their country, and their very title to office, will be materially dependent upon a firm discharge of their duty on such occasions.¹

§ 1533. Perhaps the duties of the President, in the discharge of this most delicate and important duty of his office, were never better summed up than in the following language of a distinguished commentator.² "A proper selection and appointment of subordinate officers is one of the strongest marks of a powerful mind. It is the duty of the President to acquire, as far as possible, an intimate knowledge of the capacities and characters of his fellow-citizens; to disregard the importunities of friends,

¹ The Federalist, Nos. 76, 77; 1 Kent's Comm. Lect. 13, p. 269; Rawle on Const. ch. 14, p. 162, &c.; 1 Tucker's Black. Comm. App. 340 to 343. The whole reasoning of the Federalist on this subject is equally striking for its sound practical sense and its candor. I have freely used it in the foregoing summary. The Federalist, No. 76.

² Rawle on Const. ch. 14, p. 164.

the hints or menaces of enemies, the bias of party, and the hope of popularity. The latter is sometimes the refuge of feeble-minded men; but its gleam is transient, if it is obtained by a dereliction of honest duty and sound discretion. Popular favor is best secured by carefully ascertaining and strictly pursuing the true interests of the people. The President himself is elected on the supposition that he is the most capable citizen to understand and promote those interests; and in every appointment he ought to consider himself as executing a public trust of the same nature. Neither should the fear of giving offence to the public, or pain to the individual, deter him from the immediate exercise of his power of removal on proof of incapacity or infidelity in the subordinate officer. The public, uninformed of the necessity, may be surprised, and at first dissatisfied; but public approbation ultimately accompanies the fearless and upright discharge of duty." (a)

§ 1534. It was objected by some persons, at the time of the adoption of the Constitution, that this union of the executive with the Senate in appointments would give the President an undue influence over the Senate. This argument is manifestly untenable, since it supposes that an undue influence *over* the Senate is to be acquired by the power of the latter to *restrain* him. Even if the argument were well founded, the influence of the President

(a) It would be difficult to answer the reasoning of the text if the experience of the country had not refuted it; but we are driven to the confession that since these commentaries were first published it has gradually come to be understood that appointments to office, not regulated by the civil service law or other statute, are in the main practically in the control of members of Congress of the dominant party, to be given out upon party if not personal considerations. While some of the higher appointments are to be excepted, it appears to be thought that in other cases the recommendation of the member should largely relieve the President of the responsibility for an appointment in his district, and that the member is at liberty to make the recommendation on grounds purely political and personal.

When such considerations are suffered to have force, experience demonstrates that they are apt to supersede all others, to the degradation and injury of the public service.

The evil has not been acquiesced in by one President alone, or practised alone by one party; and cases have been notorious in which persons unfitted to perform the duties have held important office at high salaries, while subordinates receiving a small stipend have performed the official service. The civil service regulations recently established have done something towards mitigating this great evil; but it is not to be disguised that no general disposition has yet been manifested by the politicians of the country to loosen the grasp of party upon the "spoils of office."

over the Senate would be still more increased, by giving him the exclusive power of appointment; for then he would be wholly beyond restraint. The opposite ground was assumed by other persons, who thought the influence of the Senate over the President would by this means become dangerous, if not irresistible.¹ There is more plausibility in this suggestion, but it proceeds upon unsatisfactory reasoning. It is certain, that the Senate cannot, by their refusal to confirm the nominations of the President, prevent him from the proper discharge of his duty. The most that can be suggested is, that they may induce him to yield to their favorites, instead of his own, by resisting his nominations. But if this should happen in a few rare instances, it is obvious that his means of influence would ordinarily form a countercheck. The power which can originate the disposal of honors and emoluments is more likely to attract than to be attracted by the power which can merely obstruct their course.² But in truth, in every system of government there are possible dangers and real difficulties; and to provide for the suppression of all influence of one department in regard to another, would be as visionary as to provide that human passions and feelings should never influence public measures. The most that can be done is to provide checks, and public responsibility. The plan of the Constitution seems as nearly perfect for this purpose as any one can be; and indeed it has been less censured than any other important delegation of power in that instrument.³

¹ A practical question of some importance arose soon after the Constitution was adopted in regard to the appointment of foreign ministers; whether the power of the Senate over the appointment gave that body a right to inquire into the policy of making any such appointment, or instituting any mission; or whether their power was confined to the consideration of the mere fitness of the person nominated for the office. If the former were the true interpretation of the senatorial authority, then they would have a right to inquire into the motives which should induce the President to create such a diplomatic mission. It was, after debate, decided by a small majority of the Senate, in 1792, that they had no right to enter upon the consideration of the policy or fitness of the mission. 5 *Marshall's Life of Washington*, ch. 5, p. 370, note. But the Senate have on several occasions since that time decided the other way; and particularly in regard to missions to Russia and Turkey.

² *The Federalist*, No. 77.

³ Whether the Senate should have a negative on presidential appointments, was a question upon which the members of the convention were much divided. Mr. John Adams (afterwards President) was opposed to it; and a friendly correspondence took place between him and Mr. Roger Sherman, of Connecticut (one of the framers of the Constitution), upon the subject. I extract from Mr. Pitkin's valuable history of

§ 1535. The other part of the clause, while it leaves to the President the appointment to all offices, not otherwise provided for, enables Congress to vest the appointment of such inferior

the United States the substance of the arguments used on each side, as they present a general view of the reasoning which had influence in the convention.

"To some general observations of Mr. Sherman in favor of this power in the Senate, Mr. Adams made the following objections:—

" 'The negative of the Senate upon appointments,' he said, 'is liable to the following objections:—

" '1. It takes away, or at least it lessens the responsibility of the executive, — our Constitution obliges me to say, that it lessens the responsibility of the President. The blame of a hasty, injudicious, weak, or wicked appointment, is shared so much between him and the Senate, that his part of it will be too small. Who can censure him, without censuring the Senate, and the legislatures who appoint them? All their friends will be interested to vindicate the President, in order to screen them from censure; besides, if an impeachment is brought before them against an officer, are they not interested to acquit him, lest some part of the odium of his guilt should fall upon them who advised to his appointment?

" '2. It turns the minds and attention of the people to the Senate, a branch of the legislature, in executive matters; it interests another branch of the legislature in the management of the executive; it divides the people between the executive and the Senate; whereas all the people ought to be united to watch the executive, to oppose its encroachments, and resist its ambition. Senators and representatives, and their constituents, — in short, the aristocratical and democratical divisions of society, — ought to be united, on all occasions, to oppose the executive or the monarchical branch, when it attempts to overleap its limits. But how can this union be effected, when the aristocratical branch has pledged its reputation to the executive by consenting to an appointment?

" '3. It has a natural tendency to excite ambition in the Senate. An active, ardent spirit, in that house, who is rich, and able, has a great reputation and influence, will be solicited by candidates for office; not to introduce the idea of bribery, because, though it certainly would force itself in, in other countries, and will probably here, when we grow populous and rich, yet it is not yet, I hope, to be dreaded. But ambition must come in already. A senator of great influence will be naturally ambitious, and desirous of increasing his influence. Will he not be under a temptation to use his influence with the President, as well as his brother senators, to appoint persons to office in the several States who will exert themselves in elections to get out his enemies or opposers, both in Senate and House of Representatives, and to get in his friends, perhaps his instruments? Suppose a senator to aim at the treasury office for himself, his brother, father, or son. Suppose him to aim at the President's chair, or Vice-President's, at the next election, or at the office of war, foreign or domestic affairs, — will he not naturally be tempted to make use of his whole patronage, his whole influence, in advising to appointments, both with President and senators, to get such persons nominated as will exert themselves in elections of President, Vice-President, senators, and House of Representatives, to increase his interests, and promote his views? In this point of view I am very apprehensive, and this defect in our Constitution will have an unhappy tendency to introduce corruption of the grossest kinds, both of ambition and avarice, into all our elections. And this will be the worst of poisons to our Constitution; it will not only destroy the present form of government, but ren-

officers, as they may think proper, in the President, in the courts of law, or in the heads of departments. The propriety of this discretionary power in Congress, to some extent, cannot well be

der it almost impossible to substitute in its place any free government, even a better limited monarchy, or any other than a despotism or a simple monarchy.

“4. To avoid the evil under the last head, it will be in danger of dividing the continent into two or three nations, — a case that presents no prospect but of perpetual war.

“5. This negative on appointments is in danger of involving the Senate in reproach, obloquy, censure, and suspicion, without doing any good. Will the Senate use their negative or not? If not, why should they have it? Many will censure them for not using it; many will ridicule them, call them servile, &c., if they do use it. The very first instance of it will expose the senators to the resentment not only of the disappointed candidate and all his friends, but of the President and all his friends; and those will be most of the officers of government through the nation.

“6. We shall very soon have parties formed, — a court and country party, — and these parties will have names given them; one party in the House of Representatives will support the President and his measures and ministers, — the other will oppose them; a similar party will be in the Senate, — these parties will struggle with all their art, perhaps with intrigue, perhaps with corruption, at every election, to increase their own friends, and diminish their opposers. Suppose such parties formed in the Senate, and then consider what factions, divisions, we shall have there upon every nomination.

“7. The Senate have not time. You are of opinion “that the concurrence of the Senate in the appointment to office will strengthen the hands of the executive, and secure the confidence of the people much better than a select council, and will be less expensive;” but in every one of these ideas I have the misfortune to differ from you. It will weaken the hands of the executive, by lessening the obligation, gratitude, and attachment of the candidate to the President, by dividing his attachment between the executive and legislature, which are natural enemies.

“Officers of government, instead of having a single eye, and undivided attachment to the executive branch, as they ought to have, consistent with law and the Constitution, will be constantly tempted to be factious with their factious patrons in the Senate. The President's own officers, in a thousand instances, will oppose his just and constitutional exertions, and screen themselves under the wings of their patrons and party in the legislature. Nor will it secure the confidence of the people; the people will have more confidence in the executive in executive matters, than in the Senate. The people will be constantly jealous of factious schemes in the senators to unduly influence the executive, and of corrupt bargains between the Senate and executive, to serve each other's private views. The people will also be jealous that the influence of the Senate will be employed to conceal, connive, and defend guilt in executive officers, instead of being a guard and watch upon them, and a terror to them. A council selected by the President himself, at his pleasure, from among the senators, representatives, and nation at large, would be purely responsible: in that case, the Senate, as a body, would not be compromised. The Senate would be a terror to privy councillors; its honor would never be pledged to support any measure or instrument of the executive beyond justice, law, and the Constitution. Nor would a privy council be more expensive. The whole Senate must now deliberate on every appointment; and, if they ever find time for it, you will find that a great deal of time

questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to Congress to act according to the lights of experience. It is

will be required and consumed in this service. Then the President might have a constant executive council; now he has none.

"I said, under the seventh head, that the Senate would not have time. You will find that the whole business of this government will be infinitely delayed by this negative of the Senate on treaties and appointments. Indian treaties and consular conventions have been already waiting for months, and the Senate have not been able to find a moment of time to attend to them; and this evil must constantly increase, so that the Senate must be constantly sitting, and must be paid as long as they sit.

"But I have tired your patience. Is there any truth or importance in these broken hints and crude surmises, or not? To me they appear well founded and very important."

"To these remarks Mr. Sherman replied, that he esteemed 'the provision made for appointments to office to be a matter of very great importance, on which the liberties and safety of the people depended nearly as much as on legislation. If that was vested in the President alone, he might render himself despotic. It was a saying of one of the kings of England, "*that while the king could appoint the bishops and judges, he might have what religion and laws he pleased.*" To give that observation its full effect, they must hold their offices during his pleasure; by such appointments, without control, a power might be gradually established that would be more formidable than a standing army.

"It appears to me that the Senate is the most important branch in the government, for the aid and support of the executive, for securing the rights of the individual States, the government of the United States, and the liberties of the people. The executive is not to execute its own will, but the will of the legislature declared by the laws; and the Senate, being a branch of the legislature, will be disposed to accomplish that end, and advise to such appointments as will be most likely to effect it; from their knowledge of the people in the several States, they can give the best information who are qualified for office. And they will, as you justly observe, in some degree lessen his responsibility; yet, will he not have as much remaining as he can well support? and may not their advice enable him to make such judicious appointments as to render responsibility less necessary? No person can deserve censure, when he acts honestly according to his best discretion.

"The senators, being chosen by the legislatures of the States, and depending on them for re-election, will naturally be watchful to prevent any infringement of the rights of the States. And the government of the United States being federal, and instituted by a number of sovereign States for the better security of their rights, and advancement of their interests, they may be considered as so many pillars to support it, and by the exercise of the State governments, peace and good order may be preserved in the places most remote from the seat of the federal government, as well as at the centre.

"I believe this will be a better balance to secure the government than three independent negatives would be.

"I think you admit, in your Defence of the Governments of the United States, that even one branch might serve in a diplomatic government, like that of the Union; but I think the Constitution is much improved by the addition of another branch, and those of the executive and judiciary. This seems to be an improvement on federal

difficult to foresee or to provide for all the combinations of circumstances which might vary the right to appoint in such cases.

government beyond what has been made by any other States. I can see nothing in the Constitution that will tend to its dissolution, except the article for making amendments.

“That the evils that you suggest may happen, in consequence of the power vested in the Senate to aid the executive, appears to me to be but barely possible. The senators, from the provision made for their appointment, will commonly be some of the most respectable citizens in the States for wisdom and probity, and superior to faction, intrigue, or low artifice, to obtain appointments for themselves or their friends; and any attempts of that kind would destroy their reputation with a free and enlightened people, and so frustrate the end they would have in view. Their being candidates for re-election will probably be one of the most powerful motives (next to that of their virtue) to fidelity in office, and by that means alone would they hope for success. “He that walketh uprightly walketh surely,” is the saying of a divinely-inspired writer; they will naturally have the confidence of the people, as they will be chosen by their immediate representatives, as well as from their characters, as men of wisdom and integrity. And I see not why all the branches of government should not harmonize in promoting the great end of their institution, — the good and happiness of the people.

“The senators and representatives being eligible from the citizens at large, and wealth not being a requisite qualification for either, they will be persons nearly equal, as to wealth and other qualifications, so that there seems not to be any principle tending to aristocracy, which, if I understand the term, is a government by nobles, independent of the people, which cannot take place with us in either respect without a total subversion of the Constitution. I believe the more this provision of the Constitution is attended to and experienced, the more the wisdom and utility of it will appear. As senators cannot hold any other office themselves, they will not be influenced, in their advice to the President, by interested motives. But it is said, they may have friends and kindred to provide for. It is true they may; but, when we consider their character and situation, will they not be diffident of nominating a friend or relative who may wish for an office and be well qualified for it, lest it should be suspected to proceed from partiality? And will not their fellow-members have a degree of the same reluctance, lest it should be thought they acted from friendship to a member of their body, so that their friends and connections would stand a worse chance, in proportion to their real merit, than strangers? But if the President was left to select a council for himself, though he may be supposed to be actuated by the best motives, yet he would be surrounded by flatterers, who would assume the character of friends and patriots, though they had no attachment to the public good, no regard to the laws of their country, but, influenced wholly by self-interest, would wish to extend the power of the executive in order to increase their own. They would often advise him to dispense with laws that should thwart their schemes, and, in excuse, plead that it was done from necessity, to promote the public good; they will use their own influence, induce the President to use his, to get laws repealed or the Constitution altered to extend his powers and prerogatives, under pretext of advancing the public good, and gradually render the government a despotism. This seems to be according to the course of human affairs, and what may be expected from the nature of things. I think that members of the legislature would be most likely duly

In one age the appointment might be most proper in the President; and in another age, in a department.

§ 1536. In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the Constitution, whose appointment does not necessarily require the concurrence of the Senate.¹ In many cases of appointments, Congress have required the concurrence of the Senate, where, perhaps, it might not be easy to say that it was required by the Constitution. The power of Congress has been exerted to a great extent, under this clause, in favor of the executive department. The President is by law invested, either solely or with the Senate, with the appointment of all military and naval officers, and of the most important civil officers, and especially of those connected with the administration of justice, the collection of the revenue, and the supplies and expenditures of the nation. The courts of the Union possess the narrow prerogative of appointing their own clerk and reporter, without any further patronage. The heads of departments are, in like manner, generally entitled to the appointment of the clerks in their respective offices. But the great anomaly in the system is the enormous patronage of the postmaster-general, who is invested with the sole and exclusive authority to appoint and remove all deputy-postmasters; and whose power and influence have thus, by slow degrees, accumulated, until it is, perhaps, not too much to say that it rivals, if it does not exceed, in value and extent, that of the President himself. How long a power, so vast and so accumulating, shall remain without any check on the part of any other branch of the government, is a question for statesmen and not for jurists. But it cannot be disguised, that it will be idle to impose constitutional restraints upon high executive appointments, if this power, which pervades every village of the republic, and exerts an irresistible,

to execute the laws, both in the executive and judiciary departments.” 2 Pitkin’s Hist. pp. 285 to 291.

¹ Rawle on Const. ch. 14, pp. 163, 164; 1 Lloyd’s Debates, 480 to 600; 2 Lloyd’s Debates, 1 to 12; Sergeant on Const. ch. 29 (ch. 31). Whether the heads of departments are inferior officers, in the sense of the Constitution, was much discussed in the debate on the organization of the department of foreign affairs, in 1789. The result of the debate seems to have been that they were not. 1 Lloyd’s Debates, 480 to 600; 2 Lloyd’s Debates, 1 to 12; Sergeant on Const. ch. 29 (ch. 31).

though silent influence, in the direct shape of office, or in the no less inviting form of lucrative contracts, is suffered to remain without scrutiny or rebuke. It furnishes no argument against the interposition of a check, which shall require the advice and consent of the Senate to appointments, that the power has not hitherto been abused. In its own nature, the post-office establishment is susceptible of abuse to such an alarming degree; the whole correspondence of the country is so completely submitted to the fidelity and integrity of the agents who conduct it; and the means of making it subservient to mere state policy are so abundant, that the only surprise is, that it has not already awakened the public jealousy and been placed under more effectual control. It may be said, without the slightest disparagement of any officer who has presided over it, that if ever the people are to be corrupted, or their liberties are to be prostrated, this establishment will furnish the most facile means, and be the earliest employed to accomplish such a purpose.¹

§ 1537. It is observable, that the Constitution makes no mention of any power of removal by the executive of any officers whatsoever. As, however, the tenure of office of no officers, except those in the judicial department, is, by the Constitution, provided to be during good behavior, it follows, by irresistible inference, that all others must hold their offices during pleasure, unless Congress shall have given some other duration to their office.² As far as Congress constitutionally possess the power to regulate and delegate the appointment of "inferior officers," so far they may prescribe the term of office, the manner in which and the persons by whom the removal as well as the appointment to office shall be made.³ But two questions naturally occur upon this subject. The first is, to whom, in the absence of all such legislation, does the power of removal belong; to the appointing power, or to the executive; to the President and Senate, who have concurred in the appointment, or to the President alone? The next is, if the power of removal belongs to the executive,

¹ It is truly surprising that, while the learned commentator on Blackstone has been so feelingly alive to all other exertions of national power and patronage, this source of patronage should not have drawn from him a single remark, except of commendation. 1 Tuck. Black. Comm. App. 264, 341, 342.

² 1 Lloyd's Debates, 511, 512.

³ See *Marbury v. Madison*, 1 Cranch, 137, 155.

in regard to any appointments confided by the Constitution to him, whether Congress can give any duration of office in such cases, not subject to the exercise of this power of removal?¹ Hitherto the latter has remained a merely speculative question as all our legislation, giving a limited duration to office, recognizes the executive power of removal as in full force.²

§ 1538. The other is a vastly important practical question; and, in an early stage of the government, underwent a most elaborate discussion.³ The language of the Constitution is, that the President "shall nominate, and, by and with the advice and consent of the Senate, appoint," &c. The power to nominate does not naturally or necessarily include the power to remove; and if

¹ Another question occurred, upon carrying into effect the act of Congress of 1821, for reducing the military establishment. President Monroe, on that occasion, contended that he had a right, in filling the original vacancies in the artillery, and in the newly created office of adjutant-general, to place in them any officer belonging to the whole military establishment, whether of the staff or of the line. "In filling original vacancies," said he, "that is, offices newly created, it is my opinion that Congress have no right, under the Constitution, to impose any restraint by law on the power granted to the President, so as to prevent his making a free selection for these offices from the whole body of his fellow-citizens." "If the law imposed such a restraint, it would be void." "If the right of the President to fill these original vacancies, by the selection of officers from any branch of the whole military establishment, was denied, he would be compelled to place in them officers of the same grade, whose corps had been reduced, and they with them. The effect, therefore, of the law, as to those appointments, would be, to legislate into office men who had been already legislated out of office, taking from the President all agency in their appointment." *Message*, 12th April, 1822; 1 *Executive Journal*, 286. The Senate wholly disagreed to this doctrine, contending that, as Congress possessed the power to make rules and regulations for the land and naval forces, they had a right to make any which they thought would promote the public service. This power had been exercised from the foundation of the government in respect to the army and navy. Congress have a right to fix the rule as to promotions and appointments. Every promotion is a new appointment, and is submitted to the Senate for confirmation. Congress, in all reductions of the army, have fixed the rules of reduction; and no executive had hitherto denied their rightful power so to do, or hesitated to execute such rules as had been prescribed. *Sergeant on Const.* ch. 29, ch. 31.

² In the debate in 1789, upon the bill for organizing the department for foreign affairs (the department of State), the very question was discussed; and the final vote seems to have expressed the sense of the legislature, that the power of removal by the executive could not be abridged by the legislature; at least, not in cases where the power to appoint was not subject to legislative delegation. See 5 *Marshall's Life of Washington*, ch. 3, pp. 196 to 200; 1 *Lloyd's Debates*, 351 to 366; *Id.* 450, 480 to 600; 2 *Lloyd's Debates*, 1 to 12.

³ 1 *Lloyd's Debates*, 351, 366, 450, 480 to 600; 2 *Lloyd's Debates*, 1 to 12; 5 *Marshall's Life of Washington*, ch. 3, pp. 196 to 200.

the power to appoint does include it, then the latter belongs conjointly to the executive and the Senate. In short, under such circumstances, the removal takes place, in virtue of the new appointment, by mere operation of law. It results, and is not separable, from the appointment itself.¹

§ 1539. This was the doctrine maintained with great earnestness by the Federalist;² and it had a most material tendency to quiet the just alarms of the overwhelming influence and arbitrary exercise of his prerogative of the executive, which might prove fatal to the personal independence and freedom of opinion of public officers, as well as to the public liberties of the country. Indeed, it is utterly impossible not to feel, that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man, of high ambition and feeble principles, an instrument of the worst oppression and most vindictive vengeance. Even in monarchies, while the councils of state are subject to perpetual fluctuations and changes, the ordinary officers of the government are permitted to remain in the silent possession of their offices, undisturbed by the policy or the passions of the favorites of the court. But in a republic, where freedom of opinion and action is guaranteed by the very first principles of the government, if a successful party may first elevate their candidate to office, and then make him the instrument of their resentments or their mercenary bargains; if men may be made spies upon the actions of their neighbors, to displace them from office; or if fawning sycophants upon the popular leader of the day may gain his patronage, to the exclusion of worthier and abler men, it is most manifest that elections will be corrupted at their very source; and those who seek office will have every motive to delude and deceive the people. It was not, therefore, without reason, that, in the animated discussions already alluded to, it was urged, that the power of removal was incident to the power of appointment. That it would be a most unjustifiable construction of the Constitution, and of its implied powers, to hold otherwise. That such a prerogative in the executive was in its own nature monarchical and arbitrary, and eminently dangerous to the best interests, as well as the liberties, of the country. It would convert all the officers of the country into the

¹ S. P. *Ex parte Hennen*, 13 Peters's R. 213.

² The Federalist, No. 77.

mere tools and creatures of the President. A dependence so servile on one individual would deter men of high and honorable minds from engaging in the public service. And if, contrary to expectation, such men should be brought into office, they would be reduced to the necessity of sacrificing every principle of independence to the will of the chief magistrate, or of exposing themselves to the disgrace of being removed from office, and that, too, at a time when it might no longer be in their power to engage in other pursuits.¹

§ 1540. The Federalist, while denying the existence of the power, admits, by the clearest implication, the full force of the argument, thus addressed to such a state of executive prerogative. Its language is: "*The consent of that body [the Senate] would be necessary to displace as well as to appoint.*" A change of the chief magistrate, therefore, could not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, *which connects the official existence of public men with the approbation or disapprobation of that body* which, from the greater permanency of its own composition, will, in all probability, be less subject to inconstancy than any other member of the government."² No man can fail to perceive the entire safety of the power of removal, if it must thus be exercised in conjunction with the Senate.

§ 1541. On the other hand, those who, after the adoption of the Constitution, held the doctrine (for before that period it never appears to have been avowed by any of its friends, although it was urged by its opponents, as a reason for rejecting it) that the power of removal belonged to the President, argued, that it resulted from the nature of the power, and the convenience and even necessity of its exercise. It was clearly in its nature a part

¹ 5 Marshall's Life of Washington, ch. 3, p. 198; 1 Lloyd's Debates, 351, 366, 450, 480 to 600.

² The Federalist, No. 77.

of the executive power, and was indispensable for a due execution of the laws, and a regular administration of the public affairs. What would become of the public interests, if, during the recess of the Senate, the President could not remove an unfaithful public officer ; if he could not displace a corrupt ambassador, or head of department, or other officer engaged in the finances or expenditures of the government ? If the executive, to prevent a non-execution of the laws, or a non-performance of his own proper functions, had a right to suspend an unworthy officer from office, this power was in no respect distinguishable from a power of removal. In fact, it is an exercise, though in a more moderate form, of the same power. Besides, it was argued that the danger that a President would remove good men from office was wholly imaginary. It was not by the splendor attached to the character of a particular President like Washington, that such an opinion was to be maintained. It was founded on the structure of the office. The man in whose favor a majority of the people of the United States would unite to elect him to such an office, had every probability at least in favor of his principles. He must be presumed to possess integrity, independence, and high talents. It would be impossible that he should abuse the patronage of the government, or his power of removal, to the base purposes of gratifying a party, or of ministering to his own resentments, or of displacing upright and excellent officers for a mere difference of opinion. The public odium which would inevitably attach to such conduct, would be a perfect security against it. And, in truth, removals made from such motives, or with a view to bestow the offices upon dependents, or favorites, would be an impeachable offence.¹ One of the most distinguished framers of the Constitution,² on that occasion, after having expressed his opinion decidedly in favor of the existence of the power of removal in the executive, added : "In the first place, he will be impeachable by this House before the Senate for such an act of maladministration ; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his high trust."³

¹ 1 Lloyd's Debates, 351, 366, 450, 480 to 600 ; 2 Lloyd's Debates, 1 to 12 ; 4 Elliot's Debates, 141 to 207 ; 5 Marsh. Life of Washington, ch. 3, pp. 196 to 200.

² Mr. Madison, 1 Lloyd's Debates, 503.

³ Mr. Madison, 1 Lloyd's Debates, 503.

§ 1542. After a most animated discussion, the vote finally taken in the House of Representatives was affirmative of the power of removal in the President, without any co-operation of the Senate, by the vote of thirty-four members against twenty.¹ In the Senate, the clause in the bill affirming the power was carried by the casting vote of the Vice-President.²

§ 1543. That the final decision of this question so made was greatly influenced by the exalted character of the President then in office, was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. (a) The public, how-

¹ 5 Marsh. Life of Washington, ch. 3, p. 199; 1 Lloyd's Debates, 599; 2 Lloyd's Debates, 12.

² Senate Journal, July 18, 1789, p. 42.

(a) Mr. Calhoun was among those who denied to the President the power of removal except with the advice and consent of the Senate. Works of Calhoun, I. 345, 369. See the subject considered by Mr. Webster, Works II. 179; Life by Curtis, I. 347. And further see the recent paper of Wm. A. Dunning on The Impeachment and Trial of President Johnson, in vol. 4, p. 491 *et seq.*, of Papers of the American Hist. Assoc.

One of the great questions in that famous trial was of the right of the President of removal, without the advice and consent of the Senate, during the session of that body; the removal of the Secretary of War, Mr. Stanton, being the occasion of that part of the controversy. "In providing," says Mr. Dunning, in the paper above referred to, "for the organization of the executive department in 1789 the whole subject of removal from office was fully debated. The cardinal point of the discussion was the nature of the power, — whether it was absolute . . . or whether it should be regarded as only to be exercised through the clearly defined process of appointment. The former opinion prevailed, though by a very slender majority. (The bill passed the House, 29 to 22, the Senate by the casting vote of the Vice-President. Annals of Congress, 1st Cong.

vol. ii. p. 674.) A construction was thus put upon the Constitution by legislative action, and that construction was accepted by all. Though the debates upon the adoption of the Constitution rather favored the doctrine which Congress rejected (see Federalist, No. 77), yet up to 1867 no successful practical objection had been made to the exercise of the power early conceded to the President."

Mr. Dunning goes on to show that the managers of the impeachment endeavored to meet this by the theory of a distinction between removals during session and removals during recess. The admitted construction of the President's powers "had no application when the advisory body was ready to act on an hour's notice in supplanting the objectionable person." But now came the Tenure of Office Act, passed over the President's veto, which at all events, in the view of the managers, the President was bound to obey; he could not defeat the will of Congress upon any view of a rightful motive to test the constitutionality of an act passed by that body.

"At this point was focussed," Mr. Dunning truly says, "the whole issue between the two political departments [executive and legislative]. Here Congress concentrated its heaviest fire, . . .

ever, acquiesced in this decision; and it constitutes, perhaps, the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions.¹ Even the most jealous advocates of State rights seem to have slumbered over this vast reach of authority; and have left it untouched, as the neutral ground of controversy, in which they desired to reap no harvest, and from which they retired, without leaving any protestations of title or contest.² Nor is this general acquiescence and silence without a satisfactory explanation. Until a very recent period, the power had been exercised in few cases, and generally in such as led to their own vindication. During the administration of President Washington few removals were made, and none without cause; few were made in that of the first President Adams. In that of President Jefferson the circle was greatly enlarged; but yet it was kept within narrow bounds, and with an express disclaimer of the right to remove for differences of opinion, or otherwise than for some clear public good. In the administrations of the subsequent Presidents, Madison, Monroe, and J. Q. Adams, a

¹ 1 Kent's Comm. Lect. 14, pp. 289, 290.

² Mr. Tucker, in his Commentaries on Blackstone, scarcely alludes to it. See 1 Tuck. Black. Comm. App. 341. On the other hand, Mr. Chancellor Kent has spoken on it with becoming freedom and pertinence of remark. 1 Kent's Comm. Lect. 14, pp. 289, 290.

If Andrew Johnson had been convicted on a direct presentation of the question here raised," continues the same writer, "the co-ordination of the departments in the American system would have been a thing of the past; and on the other hand if an acquittal had been secured on the same issue, the natural vantage ground occupied by the legislature under the Constitution would have been thenceforth held by the executive. Divested of all qualifications, the bare question was: Could the President, for any purpose, decline to execute or deliberately violate a law duly enacted under the forms prescribed by the Constitution? If he could, *his* will, and not that of Congress, would be the law; if he could not, he would be only the ministerial agent of Congress,

and not the chief of a co-ordinate department."

But there was room for doubt whether the Tenure of Office Act applied to the Secretary of War; and senators who voted for conviction on other articles felt the weight of doubt in regard to that statute so much as to decline to vote that the President had violated it. See "Trial of the President," pp. 449, 496; and Mr. Dunning's paper, at p. 497. The result was that the dilemma of the sharp issue suggested fortunately did not arise.

The Tenure of Office Act, passed to checkmate President Johnson, and modified upon the accession of President Grant in 1869, was, after having become obsolete, recently repealed.

general moderation and forbearance were exercised, with the approbation of the country, and without disturbing the harmony of the system. Since the induction into office of President Jackson, an opposite course has been pursued; and a system of removals and new appointments to office has been pursued so extensively, that it has reached a very large proportion of all the offices of honor and profit in the civil departments of the country. This is matter of fact; and beyond the statement of the fact¹ it is not the intention of the commentator to proceed. This extraordinary change of system has awakened general attention, and brought back the whole controversy with regard to the executive power of removal, to a severe scrutiny. Many of the most eminent statesmen in the country have expressed a deliberate opinion that it is utterly indefensible, and that the only sound interpretation of the Constitution is that avowed upon its adoption; that is to say, that the power of removal belongs to the appointing power.

§ 1544. Whether the predictions of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized, must be left to the sober judgment of the community, and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation

¹ In proof of this statement, lest it should be questioned, it is proper to say, that a list of removals (confessedly imperfect) between the 4th of March, 1829, when President Jackson came into office, and the 4th of March, 1830, has been published, by which it appears that, during that period, there were removed, eight persons in the diplomatic corps; thirty-six in the executive departments; and in the other civil departments, including consuls, marshals, district attorneys, collectors, and other officers of the customs, registers, and receivers, one hundred and ninety-nine persons. These officers include a very large proportion of all the most lucrative offices under the national government. Besides these, there were removals in the post-office department, during the same period, of four hundred and ninety-one persons. See Mr. Postmaster-General Barry's Report of 24th of March, 1830. This statement will be found in the National Intelligencer of the 27th of September, 1832, with the names of the parties (except postmasters): and I am not aware that it has ever been denied to be correct. It is impossible for me to vouch for its entire accuracy. It is not probable, that, from the first organization of the government, in 1789, down to 1829, the aggregate of all the removals made amounted to one-third its number. In President Washington's administration of eight years, only nine removals took place. See Mr. Clayton's Speech in the Senate, on the 4th of March, 1830.

to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to "inferior officers" (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases.

§ 1545. Another point of great practical importance is, when the appointment of any officer is to be deemed complete. It will be seen in a succeeding clause, that the President is to "commission all the officers of the United States." In regard to officers who are removable at the will of the executive, the point is unimportant, since they may be displaced and their commission arrested at any moment. But if the officer is not so removable, the time when the appointment is complete becomes of very deep interest.

§ 1546. This subject was very elaborately discussed in the celebrated case of *Marbury v. Madison*.¹ Marbury had been appointed a justice of the peace of the District of Columbia for five years, according to an act of Congress, by President Adams, by and with the consent of the Senate. His commission had been signed by the President, and was sealed and deposited in the department of state at the time of Mr. Jefferson's accession to the presidency, and was afterwards withheld from him by the direction of the latter. An act of Congress had directed the Secretary of State to keep the seal of the United States, and to make out, and record, and affix the seal to all civil commissions to officers of the United States, to be appointed by the President, after he should have signed the same. Upon the fullest deliberation, the court were of opinion that, when a commission has been signed by the President, the appointment is final and complete. The officer appointed has then conferred on him legal rights, which cannot be resumed. Until that, the discretion of the President may be exercised by him as to the appointment; but, from that moment, it is irrevocable. His power over the office is then terminated in all cases where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it. Neither a delivery of the commis-

¹ 1 Cranch's R. 137.

sion, nor an actual acceptance of the office, is indispensable to make the appointment perfect.

§ 1547. The reasoning upon which this doctrine is founded cannot be better elucidated than by using the very language of the opinion in which it is promulgated. After quoting the words of the Constitution and laws above referred to, it proceeds as follows:—

§ 1548. "These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations: (1) The nomination. This is the sole act of the President, and is completely voluntary. (2) The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. (3) The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.' The acts of appointing to office and commissioning the person appointed can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the Constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the Constitution, which authorizes Congress 'to vest, by law, the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments;' thus contemplating cases where the law may direct the President to commission an officer appointed by the courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused. Although that clause of the Constitution which requires the President to commission all the officers of the United States may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office, and the commission of an officer who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority

other than his own. It follows, too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and, if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it. These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

§ 1549. "This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission. Still, the commission is not necessarily the appointment, though conclusive evidence of it. But at what stage does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment, being the sole act of the President, must be completely evidenced, when it is shown that he has done everything to be performed by him. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still, it would be made when the last act to be done by the President was performed, or, at farthest, when the commission was complete. The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment on the advice and consent of the Senate concurring with his nominations has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. Some point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act required from the person possessing the power has been performed. This last act is the signature of the

commission. This idea seems to have prevailed with the legislature, when the act passed converting the department of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, 'and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:' 'Provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefor.' The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made. The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding which may be varied if the judgment of the executive shall suggest one more eligible; but is a precise course, accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, —as has been very properly stated at the bar,—under the authority of law, and not by the instructions of the President. It is a ministerial act, which the law enjoins on a particular officer for a particular purpose. If it should be supposed that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment; still, when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others. After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of

sufficient force to maintain the opposite doctrine. Such as the imagination of the court could suggest have been very deliberately examined; and, after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

§ 1550. "In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential. This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But, for the purpose of examining this objection fairly, let it be conceded that the principle claimed for its support is established. The appointment being, under the Constitution, to be made by the President *personally*, the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office. It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission, *after* it shall have been signed by the President. If, then, the act of livery be necessary to give validity to the commission, it has been delivered, when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party. But in all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the President, and the seal of the United States, are those solemnities. This objection, therefore, does not touch the case.

§ 1551. "It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment, which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the

sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

§ 1552. "It may have some tendency to elucidate this point, to inquire whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original. The act of Congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made; but not that the original had been transmitted. If, indeed, it should appear that the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. In the case of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and sealed, the order for their being recorded is given; and, whether inserted in the book or not, they are in law recorded. A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law? Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

§ 1553. "If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept. But neither the one nor the other is capable of rendering the appointment a nonentity. That this is the understanding of the government, is apparent from the whole tenor of its conduct. A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy. It is, therefore, decidedly the opinion of the court, that, when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state. Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights, which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it. Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right."¹

¹ See also Rawle on the Constitution, ch. 14, p. 166; Sergeant on Constitution, ch.

§ 1554. Another question growing out of appointments is, at what time the appointee is to be deemed in office; whether from the time of his acceptance of the office, or his complying with the preliminary requisitions (such as taking the oath of office, giving

29 [ch. 31]. The reasoning of this opinion would seem to be, in a judicial view, absolutely irresistible; and, as such, received at the time a very general approbation from the profession. It was, however, totally disregarded by President Jefferson, who on this, as on other occasions, placed his right of construing the Constitution and laws as wholly above and independent of judicial decision. In his correspondence, he repeatedly alluded to this subject, and endeavored to vindicate his conduct. In one of his letters he says: "In the case of *Marbury and Madison*, the federal judges declared that commissions, signed and sealed by the President, were valid, although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is, as yet, no deed; it is *in posse* only, but not *in esse*; and I withheld the delivery of the commission. They cannot issue a mandamus to the President or legislature, or to any of their officers." 4 *Jefferson's Correspondence*, 317; *Id.* 75; *Id.* 372, 373. It is true that the Constitution does not authorize the Supreme Court to issue a mandamus in the exercise of *original* jurisdiction, as was the case in *Marbury v. Madison*; and it was so decided by the Supreme Court. But the Act of Congress of 1789, ch. 20, § 13, had actually conferred the very power on the Supreme Court, by providing that the Supreme Court shall have power "to issue writs of mandamus, &c., to any courts appointed, or persons holding office, under the authority of the United States." So that the Supreme Court, in declining jurisdiction, in effect declared that the act of Congress was, in this respect, unconstitutional. But no lawyer could doubt that Congress might confer the power on any other court; and the Supreme Court itself might issue a mandamus in the exercise of its appellate jurisdiction. But the whole argument of President Jefferson proceeds on an assumption which is not proved. He says delivery is essential to a deed. But, assuming this to be correct in all cases, it does not establish that a commission is essential to every appointment; or that a commission must, by the Constitution, be by a deed; or that an appointment to office is not complete before the commission is sealed or delivered. The question is not, whether a deed at the common law is perfect without a delivery: but whether an appointment under the Constitution is perfect without a delivery of a commission. If a delivery were necessary, when the President had signed the commission, and delivered it to the secretary to be sealed and recorded, such delivery would be sufficient; for it is the final act required to be done by the President. But, in point of fact, the *seal* is not the seal of the President, but of the United States. The commission, sealed by the President, is not his deed; and it does not take effect as his deed. It is merely a verification of his act by the highest evidence. The doctrine, then, of deeds of private persons, at the common law, is inapplicable. It is painful to observe, in President Jefferson's writings, the constant insinuations against public men and public bodies, who differ from his own opinions or measures, of being governed by improper or unworthy motives, or mere party spirit. The very letters here cited (4 *Jefferson's Corresp.* 75, 317, 372) afford illustrations not to be mistaken; and certainly diminish the value which might otherwise be attributed to his criticisms. (a)

(a) The doctrine declared in *Marbury v. Madison* was reaffirmed in *United States v. Le Baron*, 19 How. 74. In that case the President had signed the commission of a deputy-postmaster, but had died before it had been transmitted to the appointee; and it was held that the appointment was complete.

bond for the faithful discharge of his duties, etc.,) or his actual entry upon the duties of his office. This question may become of great practical importance in cases of removals from office, and also in cases where, by law, officers are appointed for a limited term. It frequently happens that no formal removal from office is made by the President, except by nominating another person to the Senate in place of the person removed, and without any notice to him. In such a case, is the actual incumbent in office *de facto* removed immediately upon the nomination of a new officer? If so, then all his subsequent acts in the office are void, though he may have no notice of the nomination, and may, from the delay to give such notice, go on for a month to perform its functions. Is the removal to be deemed complete only when the nomination has been confirmed? Or when notice is actually given to the incumbent? Or when the appointee has accepted the office?¹ Hitherto this point does not seem to have received any judicial decision, and therefore must be treated as open to controversy. If the decision should be, that in such cases the nomination without notice creates a removal *de facto* as well as *de jure*, it is obvious that the public, as well as private individuals, may become sufferers by unintentional and innocent violations of law. A collector, for instance, may receive duties, may grant clearances to vessels, and may perform other functions of the office for months after such a nomination, without the slightest suspicion of any want of legal authority. Upon one occasion it was said by the Supreme Court, that "when a person appointed to any office [under the United States] refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy."²(a) From this remark, it would seem to be the opinion of the court that the office is completely filled in every case of vacancy as soon as the appointment is complete, independently of the acceptance of the appointee. If so, it would seem to follow that the removal must, at all events, be complete as soon as a new appointment is made.³

¹ See *Johnson v. United States*, 5 Mason's R. 425, 438, 439.

² *Marbury v. Madison*, 1 Cranch's R. 137.

³ See *Johnson v. United States*, 5 Mason's R. 425, 438, 439; *United States v. Kirkpatrick*, 4 Wheat. R. 733, 734.

(a) See also *United States v. Le Baron*, 19 How. 74.

§ 1555. The next clause of the Constitution is: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session."

§ 1556. This clause was not in the first draft of the Constitution; but was afterwards inserted by an amendment, apparently without objection.¹ One of the most extraordinary instances of a perverse intention to misrepresent, and thereby to render odious the Constitution, was in the objection, solemnly urged against this clause, that it authorized the President to fill vacancies in the Senate itself occurring during the recess;² a power which, in another clause of the Constitution, was expressly confided to the State executive. It is wholly unnecessary, however, now to dwell upon this preposterous suggestion, since it does not admit of a doubt that the power given to the President is applicable solely to appointments to offices under the United States, provided for by the Constitution and laws of the Union. It is only another proof of the gross exaggerations and unfounded alarms which were constantly resorted to, for the purpose of defeating a system which could scarcely fail of general approbation if it was fairly understood.³

§ 1557. The propriety of this grant is so obvious that it can require no elucidation. There was but one of two courses to be adopted: either that the Senate should be perpetually in session, in order to provide for the appointment of officers; or that the President should be authorized to make temporary appointments during the recess, which should expire when the Senate should have had an opportunity to act on the subject. The former course would have been at once burdensome to the Senate and expensive to the public. The latter combines convenience, promptitude of action, and general security.

§ 1558. The appointments so made, by the very language of the Constitution, expire at the next session of the Senate; and the commissions given by him have the same duration. When the Senate is assembled, if the President nominates the same officer to the office, this is to all intents and purposes a new nomination to office, and, if approved by the Senate, the appointment is a new appointment, and not a mere continuation of the old

¹ Journal of Convention, 225, 341.

² The Federalist, No. 67.

³ Ibid.

appointment. So that if a bond of fidelity in office has been given under the first appointment and commission, it does not apply to any acts done under the new appointment and commission.¹

§ 1559. The language of the clause is, that “ the President shall have power to fill up *vacancies* that may happen during the recess of the Senate.” In 1813, President Madison appointed and commissioned ministers to negotiate the treaty of peace of Ghent, during the recess of the Senate; and a question was made, whether he had a constitutional authority so to do, there being no *vacancy* of any existing office, but this being the creation of a new office. The Senate, at their next session, are said to have entered a protest against such an exercise of power by the executive. On a subsequent occasion (April 20, 1822), the Senate seem distinctly to have held that the President could not create the office of minister, and make appointments to such an office during the recess, without the consent of the Senate. By “*vacancies*” they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word “happen” had relation to some casualty not provided for by law. If the Senate are in session when offices are created by law, which have not as yet been filled, and nominations are not then made to them by the President, he cannot appoint to such offices during the recess of the Senate, because the vacancy does not happen during the recess of the Senate. In many instances, where offices are created by law, special power is, on this very account, given to the President to fill them during the recess; and it was then said, that in no other instances had the President filled such vacant offices without the special authority of law.²

§ 1560. The next section of the second article is: “He [the President] shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and, in case of a disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassa-

¹ United States v. Kirkpatrick, 9 Wheat. R. 720, 733, 734, 735.

² Sergeant on Const. ch. 29 (ch. 31); 2 Executive Journal, pp. 415, 500; 3 Executive Journal, 297.

dors and other public ministers. He shall take care that the laws be faithfully executed; (a) and shall commission all the officers of the United States."

§ 1561. The first part, relative to the President's giving information and recommending measures to Congress, is so consonant with the structure of the executive departments of the colonial and State governments, with the usage and practice of other free governments, with the general convenience of Congress, and with a due share of responsibility on the part of the executive, that it may well be presumed to be above all real objection. From the nature and duties of the executive department, he must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to Congress. The true workings of the laws; the defects in the nature or arrangements of the general systems of trade, finance, and justice; and the military, naval, and civil establishments of the Union, are more readily seen, and more constantly under the view of the executive, than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring the President to lay before Congress all facts and information which may assist their deliberations; and in enabling him at once to point out the evil and to suggest the remedy. He is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them.¹

¹ See 1 Tuck. Black. Comm. App. 343, 344, 345; The Federalist, No. 78; Rawle on Const. ch. 16, p. 171. The practice in the time of President Washington and President John Adams was, for the President, at the opening of each session of Congress, to meet both houses in person and deliver a speech to them, containing his views on public affairs and his recommendations of measures. On other occasions, he simply addressed written messages to them, or either of them, according to the nature of the message. To the speeches thus made a written answer was given by each house; and thus an opportunity was afforded, by the opponents of the administration, to review its whole policy in a single debate on the answer. That practice was discontinued by President Jefferson, who addressed all his communications to Congress by written messages; and to these no answers were returned. Rawle on Const. ch. 16, pp. 171, 172, 173. The practice thus introduced by him has been ever since exclusively pursued by all succeeding Presidents; whether for the better has been gravely doubted by some of our most distinguished statesmen.

(a) The courts will not allow a bill to be filed for the purpose of obtaining an injunction against the execution of a law by the President on an allegation that it

is unconstitutional. *Mississippi v. Johnson*, 4 Wall. 475. See also *Georgia v. Stanton*, 6 Wall. 50.

§ 1562. The power to convene Congress on extraordinary occasions is indispensable to the proper operations and even safety of the government. Occasions may occur in the recess of Congress, requiring the government to take vigorous measures to repel foreign aggressions, depredations, and direct hostilities; to provide adequate means to mitigate or overcome unexpected calamities; to suppress insurrections; and to provide for innumerable other important exigencies, arising out of the intercourse and revolutions among nations.¹

§ 1563. The power to adjourn Congress in cases of disagreement is equally indispensable; since it is the only peaceable way of terminating a controversy which can lead to nothing but distraction in the public councils.²

§ 1564. On the other hand, the duty imposed upon him to take care that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will “preserve, protect, and defend the Constitution.” The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence or defence; for the redress of grievances or the protection of rights; for the happiness, or good order, or safety of the people.

§ 1565. The next power is to receive ambassadors and other public ministers. This has been already incidentally touched. A similar power existed under the confederation; but it was confined to receiving “ambassadors,” which word, in a strict sense (as has been already stated), comprehends the highest grade only of ministers, and not those of an inferior character. The policy of the United States would ordinarily prefer the employment of the inferior grades; and therefore the description is properly enlarged, so as to include all classes of ministers.³ Why the receiving of consuls was not also expressly mentioned, as the appointment of them is in the preceding clause, is not easily to be accounted for, especially as the defect of the confederation on this head was fully understood. The power, however, may be fairly inferred from other parts of the Constitution; and indeed seems a general incident to the executive authority. It

¹ See 1 Tuck. Black. Comm. App. 343, 344, 345; The Federalist, No. 78; Rawle on Const. ch. 16, p. 171.

² Ibid.

³ The Federalist, No. 42.

⁴ Ibid.

has constantly been exercised without objection; and foreign consuls have never been allowed to discharge any functions of office until they have received the *exequatur* of the President.¹ Consuls, indeed, are not diplomatic functionaries, or political representatives of a foreign nation; but are treated in the character of mere commercial agents.²

§ 1566. The power to receive ambassadors and ministers is always an important, and sometimes a very delicate function, since it constitutes the only accredited medium through which negotiations and friendly relations are ordinarily carried on with foreign powers. A government may in its discretion lawfully refuse to receive an ambassador or other minister without its affording any just cause of war. But it would generally be deemed an unfriendly act, and might provoke hostilities, unless accompanied by conciliatory explanations. A refusal is sometimes made on the ground of the bad character of the minister, or his former offensive conduct, or of the special subject of the embassy not being proper or convenient for discussion.³ This, however, is rarely done. But a much more delicate occasion is, when a civil war breaks out in a nation, and two nations are formed, or two parties in the same nation, each claiming the sovereignty of the whole, and the contest remains as yet undecided, *flagrante bello*. In such a case a neutral nation may very properly withhold its recognition of the supremacy of either party, or of the existence of two independent nations; and on that account refuse to receive an ambassador from either.⁴ It is obvious that in such cases the simple acknowledgment of the minister of either party or nation might be deemed taking part against the other; and thus as affording a strong countenance or opposition to rebellion and civil dismemberment. On this account, nations, placed in such a predicament, have not hesitated sometimes to declare war against neutrals, as interposing in the war; and have made them the

¹ Rawle on Const. ch. 24, pp. 224, 225.

² Ibid.; 1 Kent's Comm. Lect. 2, pp. 40 to 44; The Indian Chief, 3 Rob. R. 22; The Bello Corunnes, 6 Wheat. R. 152, 168; Viveash v. Buker, 3 Maule & Selw. R. 284.

³ 1 Kent's Comm. Lect. 2, p. 39; Rutherforth's Instit. B. 2, ch. 9, § 20; Grotius, Lib. 2, ch. 8, §§ 1, 3, 4.

⁴ Kent's Comm. Lect. 2, p. 39; Rawle on Const. ch. 20, p. 195; Gelston v. Hoyt, 3 Wheat. R. 324; United States v. Palmer, 3 Wheat. R. 630; Serg. on Const. ch. 28, pp. 324, 325 (2d edit.); ch. 30, pp. 336, 337, 338.

victims of their vengeance, when they have been anxious to assume a neutral position. The exercise of this prerogative of acknowledging new nations or ministers is, therefore, under such circumstances, an executive function of great delicacy, which requires the utmost caution and deliberation. If the executive receives an ambassador or other minister as the representative of a new nation, or of a party in a civil war in an old nation, it is an acknowledgment of the sovereign authority *de facto* of such new nation or party. If such recognition is made, it is conclusive upon the nation, unless, indeed, it can be reversed by an act of Congress repudiating it. If, on the other hand, such recognition has been refused by the executive, it is said that Congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation or party.¹ These, however, are propositions which have hitherto remained as abstract statements under the Constitution; and, therefore, can be propounded, not as absolutely true, but as still open to discussion, if they should ever arise in the course of our foreign diplomacy. The Constitution has expressly invested the executive with power to receive ambassadors and other ministers. It has not expressly invested Congress with the power either to repudiate or acknowledge them.² At all events, in the case of a revolution, or dismemberment of a nation, the judiciary cannot take notice of any new government or sovereignty until it has been duly recognized by some other department of the government, to whom the power is constitutionally confided.³

§ 1567. That a power so extensive in its reach over our foreign relations could not be properly conferred on any other than the executive department, will admit of little doubt. That it should be exclusively confided to that department, without any

¹ Rawle on Constitution, ch. 20, pp. 195, 196.

² It is surprising that the Federalist should have treated the power of receiving ambassadors and other public ministers as an executive function of little intrinsic importance. Its language is, "This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government. And it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor." The Federalist, No. 69.

³ *United States v. Palmer*, 3 Wheat. R. 610, 634, 643; *Hoyt v. Gelston*, 3 Wheat. R. 246, 323, 324; *Rose v. Himely*, 4 Cranch, 441; *The Divina Pastora*, 4 Wheat. R. 52, and note 65; *The Neustra Señora de la Caridad*, 4 Wheat. R. 497.

participation of the Senate in the functions (that body being conjointly entrusted with the treaty-making power), is not so obvious. Probably the circumstance that in all foreign governments¹ the power was exclusively confided to the executive department, and the utter impracticability of keeping the Senate constantly in session, and the suddenness of the emergencies which might require the action of the government, conduced to the establishment of the authority in its present form.² It is not, indeed, a power likely to be abused, though it is pregnant with consequences often involving the question of peace or war. And, in our own short experience, the revolutions in France, and the revolutions in South America, have already placed us in situations to feel its critical character, and the necessity of having at the head of the government an executive of sober judgment, enlightened views, and firm and exalted patriotism.³

§ 1568. As incidents to the power to receive ambassadors and foreign ministers, the President is understood to possess the power to refuse them, and to dismiss those who, having been received, become obnoxious to censure, or unfit to be allowed the privilege by their improper conduct, or by political events.⁴ While, however, they are permitted to remain as public functionaries, they are entitled to all the immunities and rights which the law of nations has provided at once for their dignity, their independence, and their inviolability.⁵

§ 1569. There are other incidental powers belonging to the executive department which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable

¹ See 1 Black. Comm. 253.

² The Federalist, No. 69.

³ See 5 Marshall's Life of Washington, ch. 6, pp. 393, 399, 404, 405, 411, 412; 1 Tuck. Black. Comm. App. 41.

⁴ See 5 Marshall's Life of Washington, ch. 6, pp. 443, 444; 7 Wait's State Papers, 282, 283, 302.

⁵ 1 Kent's Comm. Lect. 2, pp. 37, 38, 39.

only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive. But he has no authority to control other officers of the government in relation to the duties imposed upon them by law in cases not touching his political powers.¹

§ 1570. In the year 1793, President Washington thought it his duty to issue a proclamation, forbidding the citizens of the United States to take any part in the hostilities then existing between Great Britain and France; warning them against carrying goods contraband of war; and enjoining upon them an entire abstinence from all acts inconsistent with the duties of neutrality.² This proclamation had the unanimous approbation of his cabinet.³ Being, however, at variance with the popular passions and prejudices of the day, this exercise of incidental authority was assailed with uncommon vehemence, and was denied to be constitutional. It seems wholly unnecessary now to review the grounds of the controversy, since the deliberate sense of the nation has gone along with the exercise of the power, as one properly belonging to the executive duties.⁴ If the President is bound to see to the execution of the laws and treaties of the United States; and if the duties of neutrality, when the nation has not assumed a belligerent attitude, are by the law of nations obligatory upon it, it seems difficult to perceive any solid objection to a proclamation stating the facts and admonishing the citizens of their own duties and responsibilities.⁵ (a)

§ 1571. We have seen that by law the President possesses the right to require the written advice and opinions of his cabi-

¹ *Marbury v. Madison*, 1 Cranch, 137.

² 1 *Wait's American State Papers*, 44.

³ 5 *Marshall's Life of Washington*, ch. 6, pp. 404, 408.

⁴ *Rawle on Const.* ch. 20, p. 197. The learned reader, who wishes to review the whole ground, will find it treated in a masterly manner in the letters of *Pacificus*, written by Mr. Hamilton in favor of the power, and in the letters of *Helvidius*, written by Mr. Madison against it. They will both be found in the edition of the *Federalist*, printed at Washington in 1818, and in *Hallowell* in 1826, in the Appendix.

⁵ 1 *Tuck. Black. Comm. App.* 346. Both houses of Congress, in their answers to the President's speech at the ensuing session, approved of his conduct in issuing the proclamation. 1 *Tuck. Black. Comm. App.* 346.

(a) The delivering up of criminals is an incidental power under treaties. See *Speech*, 5 *Wheat. R. App. &c.*; *Id.* 25, 26, 27, 28. *Jonathan Robbins's case. Mr. Marshall's*

net ministers upon all questions connected with their respective departments. But he does not possess a like authority in regard to the judicial department. That branch of the government can be called upon only to decide controversies brought before them in a legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly requested by the executive.¹

§ 1572. The remaining section of the fourth article, declaring that the President, Vice-President, and all civil officers of the United States shall be liable to impeachment, has been already fully considered in another place. And thus is closed the examination of the rights, powers, and duties of the executive department. Unless my judgment has been unduly biased, I think it will be found impossible to hold from this part of the Constitution a tribute of profound respect, if not of the liveliest admiration. All that seems desirable in order to gratify the hopes, secure the reverence, and sustain the dignity of the nation, is, that it should always be occupied by a man of elevated talents, of ripe virtues, of incorruptible integrity, and of tried patriotism; one, who shall forget his own interests, and remember that he represents not a party, but the whole nation; one, whose fame may be rested with posterity, not upon the false eulogies of favorites, but upon the solid merit of having preserved the glory and enhanced the prosperity of the country.²

¹ 5 Marshall's *Life of Washington*, ch. 6, pp. 433, 441; *Serg. on Const.* ch. 29 [ch. 31]. See also *Hayburn's Case*, 2 Dall. R. 409, 410, and note; *Marbury v. Madison*, 1 Cranch, 137, 171. President Washington, in 1793, requested the opinion of the judges of the Supreme Court upon the construction of the treaty with France of 1778; but they declined to give any opinion, upon the ground stated in the text. 5 Marshall's *Life of Washington*, ch. 6, pp. 433, 441.

² In consequence of President Jackson's Message, negating the Bank of the United States, July 10, 1832, in which he advances the doctrine, that the decisions made by other departments of the government, including the judiciary, and even by his predecessors in office in approving laws, are not obligatory on him, the question has been a good deal agitated by statesmen and constitutional lawyers. The following extract from a letter, written by Mr. Madison to Mr. C. J. Ingersoll, on the 25th of June, 1831, contains reasoning on this subject worthy of the judgment of that great man:—

"The charge of inconsistency between my objection to the constitutionality of such a bank, in 1791, and my assent, in 1817, turns to the question how far legislative precedents, expounding the Constitution, ought to guide succeeding legislatures, and to overrule individual opinions.

"Some obscurity has been thrown over the question, by confounding it with the respect due from one legislature to laws passed by preceding legislatures. But the two

cases are essentially different. A constitution, being derived from a superior authority, is to be expounded and obeyed, not controlled or varied by the subordinate authority of a legislature. A law, on the other hand, resting on no higher authority than that possessed by every successive legislature, its expediency, as well as its meaning, is within the scope of the latter.

"The case in question has its true analogy in the obligation arising from judicial expositions of the law on succeeding judges, the Constitution being a law to the legislator, as the law is a rule of decision to the judge.

"And why are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or rather of authoritative force, in settling the meaning of a law? It must be answered, 1st, because it is a reasonable and established axiom, and the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it. *Misera est servitus ubi jus aut vagum aut incognitum.* 2d, because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear, under such circumstances, to have determined its meaning through their judiciary organ.

"Can it be of less consequence that the meaning of a constitution should be fixed and known than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation unless the Constitution be so? On the contrary, if a particular legislature, differing in the construction of the Constitution from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the Constitution, but in the laws themselves; inasmuch as all laws preceding the new construction and inconsistent with it are not only annulled for the future, but virtually pronounced nullities from the beginning.

"But it is said that the legislator, having sworn to support the Constitution, must support it in his own construction of it, however different from that put on by his predecessors, or whatever be the consequences of the construction. And is not the judge under the same oath to support the law? yet, has it ever been supposed that he was required, or at liberty, to disregard all precedents, however solemnly repeated and regularly observed; and, by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community? Has the wisest and most conscientious judge ever scrupled to acquiesce in decisions, in which he has been overruled by the matured opinions of the majority of his colleagues, and subsequently to conform himself thereto, as to authoritative expositions of the law? And is it not reasonable that the same view of the official oath should be taken by a legislator, acting under the Constitution, which is his guide, as is taken by a judge, acting under the law, which is his?

"There is, in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law; and there is a like necessity of considering it a constitutional rule of interpreting a constitution.

"That there may be extraordinary and peculiar circumstances controlling the rule in both cases, may be admitted; but, with such exceptions, the rule will force itself on the practical judgment of the most ardent theorist. He will find it impossible to adhere to, and act officially upon, his solitary opinions as to the meaning of the law or constitution, in opposition to a construction reduced to practice during a reasonable period of time; more especially, where no prospect existed of a change of construction

by the public or its agents. And if a reasonable period of time, marked with the usual sanctions, would not bar the individual prerogative, there could be no limitation to its exercise, although the danger of error must increase with the increasing oblivion of explanatory circumstances, and with the continual changes in the import of words and phrases.

"Let it, then, be left to the decision of every intelligent and candid judge, which, on the whole, is most to be relied on for the true and safe construction of a constitution; that which has the uniform sanction of successive legislative bodies through a period of years, and under the varied ascendancy of parties, or that which depends upon the opinions of every new legislature, heated as it may be by the spirit of party, eager in the pursuit of some favorite object, or led astray by the eloquence and address of popular statesmen, themselves, perhaps, under the influence of the same misleading causes.

"It was in conformity with the view here taken of the respect due to deliberate and reiterated precedents, that the Bank of the United States, though on the original question held to be unconstitutional, received the executive signature in the year 1817. The act originally establishing a bank had undergone ample discussions in its passage through the several branches of the government. It had been carried into execution throughout a period of twenty years, with annual legislative recognitions; in one instance, indeed, with a positive ramification of it into a new State, and with the entire acquiescence of all the local authorities, as well as of the nation at large; to all of which may be added, a decreasing prospect of any change in the public opinion adverse to the constitutionality of such an institution. A veto from the executive, under these circumstances, with an admission of the expediency and almost necessity of the measure, would have been a defiance to all the obligations derived from a course of precedents, amounting to the requisite evidence of the national judgment and intention.

"It has been contended that the authority of precedents was in that case invalidated by the consideration that they proved only a respect for the stipulated duration of the bank, with a toleration of it, until the law should expire, and by the casting vote given in the Senate by the Vice-President in 1811, against a bill for establishing a national bank, the vote being expressly given on the ground of unconstitutionality. But if the law itself was unconstitutional, the stipulation was void and could not be constitutionally fulfilled or tolerated. And as to the negative of the Senate, by the casting vote of the presiding officer, it is a fact, well understood at the time, that it resulted not from an equality of opinions in that assembly on the power of Congress to establish a bank, but from a junction of those who admitted the power but disapproved the plan with those who denied the power. On a simple question of constitutionality, there was a decided majority in favor of it."

There is also a very cogent argument on the same side, in Mr. Webster's speech in the Senate, in July, 1832, on the veto message of the President.

CHAPTER XXXVIII.

JUDICIARY — ORGANIZATION AND POWERS.

§ 1573. THE order of the subject next conducts us to the consideration of the third article of the Constitution, which embraces the organization and powers of the judicial department.

§ 1574. The importance of the establishment of a judicial department in the national government has been already incidentally discussed under other heads. The want of it constituted one of the vital defects of the confederation.¹ And every government must, in its essence, be unsafe and unfit for a free people where such a department does not exist with powers co-extensive with those of the legislative department.² Where there is no judicial department to interpret, pronounce, and execute the law, to decide controversies, and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty.³ The will of those who govern will become, under such circumstances, absolute and despotic; and it is wholly immaterial, whether power is

¹ The Federalist, No. 22; *Cohens v. Virginia*, 6 Wheat. R. 388; 1 Kent's Comm. Lect. 14, p. 277.

² The Federalist, No. 80; 1 Kent's Comm. Lect. 14, p. 277; *Cohens v. Virginia*, 6 Wheat. R. 384; 2 Wilson's Law Lect. ch. 3, p. 201; 3 Elliot's Deb. 143; *Osborne v. Bank of the United States*, 9 Wheat. R. 818, 819. Mr. Justice Wilson has traced out, with much minuteness of detail, the nature and character of the judicial department in ancient, as well as modern nations, and especially in England; and a perusal of his remarks will be found full of instruction. 2 Wilson's Law Lect. ch. 3, p. 201, &c.

³ 1 Kent's Comm. Lect. 14, p. 277. It has been finely remarked by Mr. Chief Justice Marshall, that "the judicial department has no will in any case. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, — a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." *Osborne v. Bank of the United States*, 9 Wheat. R. 866.

vested in a single tyrant or in an assembly of tyrants. No remark is better founded in human experience than that of Montesquieu, that "there is no liberty, if the judiciary power be not separated from the legislative and executive powers."¹ And it is no less true, that personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.² If that government can be truly said to be despotic and intolerable in which the law is vague and uncertain, it cannot but be rendered still more oppressive and more mischievous, when the actual administration of justice is dependent upon caprice, or favor, upon the will of rulers, or the influence of popularity. When power becomes right, it is of little consequence whether decisions rest upon corruption, or weakness, upon the accidents of chance, or upon deliberate wrong. In every well-organized government, therefore, with reference to the security both of public rights and private rights, it is indispensable that there should be a judicial department to ascertain and decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation.³

§ 1575. In the national government the power is equally as important as in the State governments. The laws and treaties, and even the Constitution of the United States, would become a dead letter without it. Indeed, in a complicated government like ours, where there is an assemblage of republics, combined under a common head, the necessity of some controlling judicial power, to ascertain and enforce the powers of the Union, is, if possible, still more striking. The laws of the whole would otherwise be in continual danger of being contravened by the laws of the parts.⁴ The national government would be reduced to a servile dependence upon the States; and the same scenes would be again acted over in solemn mockery which began in the neglect and ended in the ruin of the confederation.⁵ Power, without adequate means to enforce it, is like a body in a state of suspended animation. For all practical purposes, it is as if its

¹ Montesquieu's *Spirit of Laws*, B. 11, ch. 6.

² 1 Kent's *Comm. Lect.* 14, p. 273.

³ Rawle on *Constitution*, ch. 21, p. 199.

⁴ The *Federalist*, No. 22; *Chisholm v. Georgia*, 2 Dall. 419, 474; *ante*, vol. i. pp. 246, 247; 3 Elliot's *Debates*, 142.

⁵ See *Cohen's v. Virginia*, 6 Wheat. R. 384 to 390; *Id.* 402 to 404, 415; *Osborne v. Bank of the United States*, 9 Wheat. R. 818, 819; *ante*, vol. i. §§ 266, 267.

faculties were extinguished. Even if there were no danger of collision between the laws and powers of the Union and those of the States, it is utterly impossible, that, without some superintending judiciary establishment, there could be any uniform administration or interpretation of them. The idea of uniformity of decision by thirteen independent and co-ordinate tribunals (and the number is now advanced to twenty-four) is absolutely visionary, if not absurd. The consequence would necessarily be, that neither the Constitution nor the laws, neither the rights and powers of the Union nor those of the States, would be the same in any two States. And there would be perpetual fluctuations and changes growing out of the diversity of judgment, as well as of local institutions, interests, and habits of thought.¹

§ 1576. Two ends, then, of paramount importance, and fundamental to a free government, are proposed to be attained by the establishment of a national judiciary. The first is a due execution of the powers of the government; and the second is a uniformity in the interpretation and operation of those powers, and of the laws enacted in pursuance of them. The power of interpreting the laws involves necessarily the function to ascertain whether they are conformable to the Constitution or not; and if not so conformable, to declare them void and inoperative. As the Constitution is the supreme law of the land, in a conflict between that and the laws, either of Congress or of the States, it becomes the duty of the judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican constitution of government; for otherwise the acts of the legislature and executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations contained in the Constitution; and usurpations of the most unequivocal and dangerous character might be assumed without any remedy within the reach of the citizens.² The people would

¹ *Martin v. Hunter*, 1 Wheat. R. 304, 345 to 349; *The Federalist*, No. 22.

² *The Federalist*, Nos. 78, 80, 81, 82; 1 Tuck. Black. Comm. App. 355 to 360; 3 Elliot's Debates, 134. This subject is very elaborately discussed in the *Federalist*, No. 78, from which the following extract is made:—

“The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts

thus be at the mercy of their rulers in the State and national governments; and an omnipotence would practically exist, like

of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen, from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged, that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute; the intention of the people to the intention of their agents.

"Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

"This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation; so far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which

that claimed for the British Parliament. The universal sense of America has decided that, in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and State governments, so far as they are capable of being made the subject of judicial controversy.¹ It follows, that when

has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves as consonant to truth and propriety for the direction of their conduct as interpreters of the law. They thought it reasonable that, between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us, that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

"It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body."

The reasoning of Mr. Chief Justice Marshall on this subject, in *Cohens v. Virginia* (6 Wheat. R. 384 to 390), has been already cited at large, *ante*, vol. i. pp. 294 to 296. See also 6 Wheat. R. 413 to 423, and the *Federalist*, No. 22, on the same subject.

¹ 1 Kent's Comm. Lect. 20, pp. 420 to 426. See also *Cohens v. Virginia*, 6 Wheat. R. 386 to 390. The reasoning of the Supreme Court in *Marbury v. Madison* (1 Cranch, 137), on this subject is so clear and convincing, that it is deemed advisable to cite it in this place, as a corrective to those loose and extraordinary doctrines which sometimes find their way into opinions possessing official influence.

"The question whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns

they are subjected to the cognizance of the judiciary, its judgments must be conclusive; for otherwise they may be disre-

to different departments their respective powers. It may either stop here or establish certain limits, not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that these limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable, when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject. If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

"Those, then, who controvert the principle that the Constitution is to be considered in courts as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that, if the legislature

garded, and the acts of the legislature and executive enjoy a secure and irresistible triumph.¹ To the people at large, there-

shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is, in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, — a written constitution, — would of itself be sufficient in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

“The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power to say, that, in using it, the Constitution should not be looked into? — that a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

“There are many other parts of the Constitution which serve to illustrate this subject. It is declared, that ‘no tax or duty shall be laid on articles exported from any State.’ Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law? The Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed.’ If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve? ‘No person,’ says the Constitution, ‘shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.’ Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

“From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of *courts* as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: ‘I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____ according to the best of my abilities and understanding, agreeably to the *Constitution* and laws of the United States.’ Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is

¹ 1 Kent's Comm. Lect. 20, pp. 420 to 426. See also 1 Tuck. Black. Comm. App. 354 to 357; The Federalist, Nos. 3, 22, 80, 82; 2 Elliot's Deb. 380.

fore, such an institution is peculiarly valuable; and it ought to be eminently cherished by them. On its firm and independent structure they may repose with safety, while they perceive in it a faculty which is only set in motion when applied to; but which, when thus brought into action, must proceed with competent power, if required to correct the error or subdue the oppression of the other branches of the government.¹ (a) Fortunately too for the people, the function of the judiciary, in deciding on consti-

closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

"It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *Constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument."

In the Virginia Convention, Mr. Patrick Henry (a most decided opponent of the Constitution of the United States) expressed a strong opinion in favor of the right of the judiciary to decide upon the constitutionality of laws. His fears were, that the national judiciary was not so organized as that it would possess an independence sufficient for this purpose. His language was: "The honorable gentleman did our judiciary honor in saying that they had firmness enough to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary so well constituted, and so independent of the other branches, as our State judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary." 2 Elliot's Debates, 248.

¹ Rawle on Const. ch. 21, p. 199; Id. ch. 30, pp. 275, 276; 1 Wilson's Law Lect. 460, 461; 3 Elliot's Debates, 143; Id. 245; Id. 280.

(a) The duty of the judiciary to declare unconstitutional laws void, and the conscientious firmness with which that duty has usually been performed, have led to some curious and unexpected results, not the least remarkable of which is the manner in which the legislature is sometimes disposed to cast the responsibility which properly belongs to it upon the courts. It must and will often happen that the popular clamor will call for doubtful legislation; and men who depend upon the popular voice for their positions do not always

care to take the consequences of an unpopular discharge of duty, and are therefore easily induced to assent to legislation which their judgment assures them will be void, when they know that behind them are the courts which will refuse to enforce it. That this is a plain and most reprehensible evasion of duty there can be no question; and the consequences are more serious in many cases than might readily be supposed. For in every instance in which an enactment is pronounced unconstitutional, there is an

tutional questions, is not one which it is at liberty to decline. While it is bound not to take jurisdiction if it should not, it is equally true that it must take jurisdiction if it should. It cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. It cannot pass it by, because it is doubtful. With whatever doubt, with whatever difficulties a case may be attended, it must decide it, when it arises in judgment. It has no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.¹

§ 1577. The framers of the Constitution, having these great principles in view, adopted two fundamental rules with entire unanimity: first, that a national judiciary ought to be established; secondly, that the national judiciary ought to possess powers co-extensive with those of the legislative department.²

¹ *Cohens v. Virginia*, 6 Wheat. R. 404; 1 Wilson's Law Lect. 461, 462. Mr. Justice Johnson, in *Fullerton v. Bank of United States*, 1 Peters's R. 604, 614, says: "What is the course of prudence and duty, where these cases of difficult distribution as to power and right present themselves? It is to yield rather than to encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion inseparable from our many peculiar relations, cases may occur, in which the maintenance of principle and the Constitution, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty." This is a very just admonition, when addressed to other departments of the government. But the judiciary has no authority to adopt any middle course. It is compelled, when called upon, to decide whether a law is constitutional or not. If it declines to declare it unconstitutional, that is an affirmation of its constitutionality.

² Journ. of Convention, 69, 98, 121, 137, 186, 188, 189, 212; *The Federalist*, Nos. 77, 78; 2 Elliot's Debates, 380 to 394; *Id.* 404.

apparent conflict between the legislative and judicial departments of the governments; and as the public have a right to suppose that each has given to the subject its best judgment, the fact that the legislative conclusion is one way and the judicial the other, must necessarily lower in some degree the respect which the public would be inclined to have for the latter, and the confidence with which they would otherwise rely upon it. But every good citizen is interested in giving to a just and fearless discharge of judicial authority a free and liberal support, and whatever tends to lessen the hold of the

judiciary on the public confidence, in the like degree diminishes its ability to perform its functions effectually, and tends to produce disorder in the commonwealth. An injury to good government is consequently done in every instance when legislators adopt a statute which they believe to be unconstitutional, since, in so doing, they not only evade a plain duty, but they also require of the courts the performance of an obnoxious and unpopular task which ought not to be cast upon them, and which is rendered doubly unpleasant by the apparent conflict of opinion between the two departments. C.

Indeed, the latter necessarily flowed from the former, and was treated, and must always be treated, as an axiom of political government.¹ But these provisions alone would not be sufficient to insure a complete administration of public justice, or to give permanency to the republic. The judiciary must be so organized as to carry into complete effect all the purposes of its establishment. It must possess wisdom, learning, integrity, independence, and firmness. It must at once possess the power and the means to check usurpation, and enforce execution of its judgments. Mr. Burke has, with singular sagacity and pregnant brevity, stated the doctrine which every republic should steadily sustain and conscientiously inculcate. "Whatever," says he, "is supreme in a State ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its judicature, as it were, something exterior to the State."² The best manner in which this is to be accomplished must mainly depend upon the mode of appointment, the tenure of office, the compensation of the judges, and the jurisdiction confided to the department in its various branches.

§ 1578. Let us proceed, then, to the consideration of the judicial department, as it is established by the Constitution, and see how far adequate means are provided for all these important purposes.

§ 1579. The first section of the third article is as follows: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." To this may be added the clause in the enumeration of the powers of Congress in the first article (which is

¹ *Cohens v. Virginia*, 6 Wheat. R. 384; 1 Tuck. Black. Comm. App. 350; The Federalist, No. 80; 2 Elliot's Debates, 380, 390, 404; 3 Elliot's Debates, 134, 143; *Osborne v. Bank of United States*, 9 Wheat. R. 818, 819; 1 Kent's Comm. Lect. 14, p. 277.

² Burke's Reflections on the French Revolution.

but a mere repetition), that Congress shall have power "to constitute tribunals inferior to the Supreme Court." ¹ (a)

¹ It is manifest that the Constitution contemplated distinct appointments of the judges of the courts of the United States. The judges of the Supreme Court are expressly required to be appointed by the President, by and with the advice and consent of the Senate. They are, therefore, expressly appointed for that court, and for that court only. Can they be constitutionally required to act as judges of any other court? This question, it now appears, was presented to the minds of the judges of the Supreme Court who were first appointed under the Constitution; and the Chief Justice (Mr. Jay) and some of his associates were of opinion (and so stated to President Washington, in 1790, in a letter, which will be cited below at large) that they could not constitutionally be appointed to hold any other court. They were, however, required to perform the duty of circuit judges in the circuit courts, until the year 1801; and then a new system was established. The latter was repealed in 1802; and the judges of the Supreme Court were again required to perform duty in the circuit courts. In 1803, the point was directly made before the Supreme Court; but the court were then of opinion, that the practice and acquiescence, for such a period of years, commencing with the organization of the judicial system, had fixed the construction, and it could not then be shaken. *Stuart v. Laird*, 1 Cranch's R. 299, 309. That there have, notwithstanding, been many scruples and doubts upon the subject, in the minds of the judges of the Supreme Court, since that period, is well known. See 1 Paine's Cir. Rep.

We here insert the letter of Mr. Chief Justice Jay and his associates, for which we are indebted to the editors of that excellent work, the *American Jurist*. It is in the number for October, 1830 (vol. 4, p. 294, &c.).

"The representation alluded to was in answer to a letter, addressed by General Washington to the court upon its organization, which we have therefore prefixed to it.

" *United States, April 3d, 1790.*

"GENTLEMEN: I have always been persuaded that the stability and success of the national government, and consequently the happiness of the people of the United States would depend, in a considerable degree, on the interpretation of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.

"As you are about to commence your first circuit, and many things may occur in such an unexplored field which it would be useful should be known, I think it proper to acquaint you, that it will be agreeable to me to receive such information and remarks on this subject as you shall from time to time judge it expedient to make.

"GEO. WASHINGTON.

"The Chief Justice and Associate Justices
of the Supreme Court of the United States.'

"SIR: We, the Chief Justice and Associate Justices of the Supreme Court of the United States, in pursuance of the letter which you did us the honor to write on the third of April last, take the liberty of submitting to your consideration the

(a) With the exception of the creation of the Supreme Court, the power of Congress to create courts and to confer upon them as much or as little jurisdiction per-

taining to the federal government as it thinks best, is unlimited. *United States v. Union Pacific R. Co.*, 98 U. S. 569.

§ 1580. In the convention which framed the Constitution, no diversity of opinion existed as to the establishment of a supreme following remarks on the "Act to establish the judicial courts of the United States."

"It would doubtless have been singular if a system so new and untried, and which was necessarily formed more on principles of theory and probable expediency than former experience, had, in practice, been found entirely free from defects.

"The particular and continued attention which our official duties called upon us to pay to this act, has produced reflections which, at the time it was made and passed, did not probably occur in their full extent either to us or others.

"On comparing this act with the Constitution, we perceive deviations which, in our opinions, are important.

"The first section of the third article of the Constitution declares, that "the judicial power of the United States shall be vested in one *Supreme Court*, and in such inferior courts as the Congress may from time to time ordain and establish."

"The second section enumerates the cases to which the judicial power shall extend. It gives to the Supreme Court original jurisdiction in only *two* cases, but in all the others vests it with *appellate* jurisdiction; and that with such exceptions, and under such regulations, as the Congress shall make.

"It has long and very universally been deemed essential to the due administration of justice, that some national court or council should be instituted, or authorized to examine the acts of the ordinary tribunals, and ultimately to affirm or reverse their judgments and decrees; it being important that these tribunals should be confined to the limits of their respective jurisdiction, and that they should uniformly interpret and apply the law in the same sense and manner.

"The appellate jurisdiction of the Supreme Court enables it to confine inferior courts to their proper limits, to correct their involuntary errors, and, in general, to provide that justice be administered accurately, impartially, and uniformly. These controlling powers were unavoidably great and extensive, and of such a nature as to render their being combined with other judicial powers in the same persons inadvisable.

"To the natural as well as legal incompatibility of *ultimate* appellate jurisdiction with original jurisdiction, we ascribe the exclusion of the Supreme Court from the latter, except in two cases. Had it not been for this exclusion, the unalterable, ever-binding decisions of this important court would not have been secured against the influences of those predilections for individual opinions, and of those reluctances to relinquish sentiments publicly though perhaps too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.

"Without such exclusion, no court, possessing the last resort of justice, would have acquired and preserved that public confidence which is really necessary to render the wisest institutions useful. A celebrated writer justly observes, that "next to doing right, the great object in the administration of public justice should be to give public satisfaction."

"Had the Constitution permitted the Supreme Court to sit in judgment, and finally to decide on the acts and errors done and committed by its own members, as judges of inferior and subordinate courts, much room would have been left for men, on certain occasions, to suspect that an unwillingness to be thought and found in the wrong had produced an improper adherence to it; or that mutual interest had generated mutual civilities and tendernesses injurious to right.

"If room had been left for such suspicions, there would have been reason to appre-

tribunal. The proposition was unanimously adopted.¹ In respect to the establishment of inferior tribunals, some diversity

hens that the public confidence would diminish almost in proportion to the number of cases in which the Supreme Court might *affirm* the acts of any of its members.

“ ‘Appeals are seldom made but in doubtful cases, and in which there is, at least, much appearance of reason on both sides ; in such cases, therefore, not only the losing party, but others not immediately interested, would sometimes be led to doubt whether the affirmation was entirely owing to the mere preponderance of right.

“ ‘These, we presume, were among the reasons which induced the convention to confine the Supreme Court, and consequently its judges, to appellate jurisdiction. We say “consequently its judges,” because the reasons for the one apply also to the other.

“ ‘We are aware of the distinction between a court and its judges ; and are far from thinking it illegal or unconstitutional, however it may be inexpedient, to employ them for other purposes, provided the latter purposes be consistent and compatible with the former. But from this distinction it cannot, in our opinions, be inferred that the judges of the Supreme Court may also be judges of inferior and *subordinate* courts, and be at the same time both the *controllers* and the *controlled*.

“ ‘The application of these remarks is obvious. The circuit courts established by the act are courts inferior and subordinate to the Supreme Court. They are vested with original jurisdiction in the cases from which the Supreme Court is excluded ; and to us it would appear very singular if the Constitution was capable of being so construed as to exclude the court, but yet admit the judges of the court. We, for our parts, consider the Constitution as plainly opposed to the appointment of the same persons to both offices ; nor have we any doubts of their legal incompatibility.

“ ‘Bacon, in his Abridgment, says that “offices are said to be incompatible and inconsistent, so as to be executed by one person, when, from the multiplicity of business in them, they cannot be executed with care and ability ; or when their being subordinate, and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty ; and this, my Lord Coke says, is of that importance, that if all offices, civil and ecclesiastical, &c., were only executed each by different persons, it would be for the good of the commonwealth, and advancement of justice, and preferment of deserving men. If a forester, by patent for his *life*, is made justice in eyre of the same forest, *hac vice*, the forestership is become *void* ; for these offices are incompatible, because the forester is *under the correction* of the justice in eyre, and he cannot *judge himself*. Upon a mandamus to restore one to the place of town-clerk, it was returned, that he was elected mayor and sworn, and, therefore, they chose another town-clerk ; and the court were strong of opinion that the offices were incompatible, because of the *subordination*. A coroner made a sheriff, ceases to be a coroner ; so a parson made a bishop, and a judge of the common pleas made a judge of the king’s bench,” &c.

“ ‘Other authorities on this point might be added ; but the reasons on which they rest seem to us to require little elucidation or support.

“ ‘There is in the act another deviation from the Constitution, which we think it incumbent on us to mention.

“ ‘The second section of the second article of the Constitution declares, that the President shall nominate, and, by and with the advice and consent of the Senate,

¹ Journal of Convention, 69, 98, 137, 186.

of opinion was in the early stages of the proceedings exhibited. A proposition to establish them was at first adopted. This was struck out by the vote of five States against four, two being divided; and a proposition was then adopted, "that the national legislature be empowered to appoint inferior tribunals," by the vote of seven States against three, one being divided;¹ and ultimately this proposition received the unanimous approbation of the convention.²

§ 1581. To the establishment of one court of supreme and final jurisdiction, there do not seem to have been any strenuous objections generally insisted on in the State conventions, though many were urged against certain portions of the jurisdiction proposed by the Constitution to be vested in the courts of the United States.³ The principal question seems to have been of a different nature, whether it ought to be a distinct co-ordinate department or a branch of the legislature. And here it was remarked by the Federalist, that the same contradiction of opinion was observable among the opponents of the Constitution as in many other cases. Many of those who objected to the Senate as a court of impeachment, upon the ground of an improper intermixture of legislative and judicial functions, were, at least by implication, advocates for the propriety of vesting the ultimate decision of all causes in the whole or in a part of the legislative body.⁴

§ 1582. The arguments, or rather suggestions, upon which this scheme was propounded, were to the following effect: The au-

"shall appoint judges of the Supreme Court, and *all* other officers of the United States, whose appointments are not *therein* otherwise provided for."

"The Constitution not having otherwise provided for the appointment of the judges of the inferior courts, we conceive that the appointment of some of them, namely, of the circuit courts, by an act of the legislature, is a departure from the Constitution, and an exercise of powers which constitutionally and exclusively belong to the President and Senate.

"We should proceed, sir, to take notice of certain defects in the act relative to expediency, which we think merit the consideration of the Congress. But, as these are doubtless among the objects of the late reference, made by the House of Representatives to the attorney-general, we think it most proper to forbear making any remarks on this subject at present.

"We have the honor to be, most respectfully,

"Sir, your obedient and humble servants.

"The President of the United States."

¹ Journal of Convention, 69, 98, 99, 102, 137.

² Id. 188, 212.

³ See 2 Elliot's Debates, 380 to 427.

⁴ The Federalist, No. 81.

thority of the Supreme Court of the United States, as a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision and correction of the legislative body. This is as unprecedented as it is dangerous. In Great Britain the judicial power in the last resort resides in the House of Lords, which is a branch of the legislature. And this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify by law the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.¹

§ 1583. The friends of the Constitution, in answer to these suggestions, replied, that they were founded in false reasoning or a misconception of fact. In the first place, there was nothing in the plan which directly empowered the national courts to construe the laws according to the *spirit* of the Constitution, or which gave them any greater latitude in this respect than what was claimed and exercised by the State courts. The Constitution, indeed, ought to be the standard of construction for the laws; and wherever there was an opposition, the laws ought to give place to the Constitution. But this doctrine was not deducible from any circumstance peculiar to this part of the Constitution, but from the general theory of a limited constitution; and, as far as it was true, it was equally applicable to the State governments.

§ 1584. So far as the objection went to the organization of the Supreme Court as a distinct and independent department, it admitted of a different answer. It was founded upon the general maxim of requiring a separation of the different departments of government, as most conducive to the preservation of public liberty and private rights. It would not, indeed, absolutely violate that maxim to allow the ultimate appellate jurisdiction to be

¹ The Federalist, No. 81. The learned reader will trace out, in subsequent periods of our history, the same objections revived in other imposing forms, under the sanction of men who have attained high ascendancy and distinction in the struggles of party.

vested in one branch of the legislative body. But there were many urgent reasons why the proposed organization would be preferable. It would secure greater independence, impartiality, and uniformity in the administration of justice.

§ 1585. The reasoning of the Federalist¹ on this point is so clear and satisfactory, and presents the whole argument in so condensed a form, that it supersedes all further formal discussion. "From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to influence their construction; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in that of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes in the first instance to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for the knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as on this account there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and equity.

§ 1586. "These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the con-

¹ The Federalist, No. 81.

stitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to these models is highly to be commended.¹

§ 1587. "It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British nor the State constitution authorizes the reversal of a judicial sentence by a legislative act. Nor is there anything in the proposed constitution, more than in either of them, by which it is forbidden. In the former, as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case, though it may prescribe a new rule for future cases. This is the principle, and it applies, in all its consequences, exactly in the same manner and extent to the State governments as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

§ 1588. "It may, in the last place, be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or, in any sensible degree, to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body and of determining upon them in the other would give to that body upon the members of the judicial department. This

¹ At the present time, the same scheme of organizing the judicial power exists substantially in every State in the Union except in New York. (a)

(a) Since 1846 in New York also.

is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments."

§ 1589. In regard to the power of constituting inferior courts of the Union, it is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It enables the national government to institute or authorize, in each State or district of the United States, a tribunal competent to the determination of all matters of national jurisdiction within its limits. (a) One of two courses only could be open for adoption,—either to create inferior courts under the national authority, to reach all cases fit for the national jurisdiction, which either constitutionally or conveniently could not be of original cognizance in the Supreme Court; or, to confide jurisdiction of the same cases to the State courts, with a right of appeal to the Supreme Court. To the latter course solid objections were thought to apply, which rendered it ineligible and unsatisfactory. In the first place, the judges of the State courts would be wholly irresponsible to the national government for their conduct in the administration of national justice; so that the national government would or might be wholly dependent upon the good will or sound discretion of the States in regard to the efficiency, promptitude, and ability with which the judicial authority of the nation was administered. In the next place, the prevalency of a local or sectional spirit might be found to disqualify the State tribunals for a suitable discharge of national judicial functions; and the very modes of appointment of some of the State judges might render them improper channels of the judicial authority of the Union.¹ State judges, holding their offices during pleasure, or from year to year, or for other short periods, would, or at least might, be too little independent to be relied upon for an inflexible execution of the national laws.

¹ The Federalist, No. 81. See also *Cohens v. Virginia*, 6 Wheat. R. 386, 387.

(a) See *United States v. Union Pacific R. Co.*, 98 U. S. 569.

What could be done, where the State itself should happen to be in hostility to the national government, as might well be presumed occasionally to be the case, from local interests, party spirit, or peculiar prejudices, if the State tribunals were to be the sole depositaries of the judicial powers of the Union in the ordinary administration of criminal as well as of civil justice? Besides, if the State tribunals were thus entrusted with the ordinary administration of the criminal and civil justice of the Union, there would be a necessity for leaving the door of appeal as widely open as possible. In proportion to the grounds of confidence in or distrust of the subordinate tribunals, ought to be the facility or difficulty of appeals. An unrestrained course of appeals would be a source of much private as well as public inconvenience. It would encourage litigation, and lead to the most oppressive expenses.¹ Nor should it be omitted that this very course of appeals would naturally lead to great jealousies, irritations, and collisions between the State courts and the Supreme Court, not only from differences of opinions, but from that pride of character and consciousness of independence which would be felt by State judges possessing the confidence of their own State and irresponsible to the Union.²

§ 1590. In considering the first clause of the third section, declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," we are naturally led to the inquiry, whether Congress possess any discretion as to the creation of a Supreme Court and inferior courts, in whom the constitutional jurisdiction is to be vested. This was at one time matter of much discussion, and is vital to the existence of the judicial department. If Congress possess any discretion on this subject, it is obvious that the judiciary, as a co-ordinate department of the government, may, at the will of Congress, be annihilated or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what

¹ The Federalist, No. 81.

² Mr. Rawle has remarked, that "the State tribunals are no part of the government of the United States. To render the government of the United States dependent on them, would be a solecism almost as great as to leave out an executive power entirely, and to call on the States alone to enforce the laws of the Union." Rawle on Const. ch. 21, p. 200.

manner, or at what time, or under what circumstances, it may or ought to be exercised. The whole argument upon which such an interpretation has been attempted to be maintained is, that the language of the Constitution, "shall be vested," is not imperative, but simply indicates the future tense. This interpretation has been overruled by the Supreme Court, upon solemn deliberation.¹ "The language of the third article," say the court, "throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? 'The judges, both of the supreme and inferior courts, *shall hold* their offices during good behavior, and *shall*, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.' Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions; it must be in the negative. The object of the Constitution was to establish three great departments of government,—the legislative, the executive, and the judicial department. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two States be heard and determined? The judicial power must, therefore, be vested in some court by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Consti-

¹ See *Martin v. Hunter*, 1 Wheat. R. 304, 316. The commentator, in examining the structure and jurisdiction of the judicial department, is compelled, by a sense of official reserve, to confine his remarks chiefly to doctrines which are settled, or which have been deemed incontrovertible, leaving others to be discussed by those who are unrestrained by such considerations.

tution, they might defeat the Constitution itself. A construction which would lead to such a result cannot be sound.

§ 1591. "The same expression, 'shall be vested,' occurs in other parts of the Constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares, that 'all legislative powers herein granted *shall be vested* in a Congress of the United States.' Will it be contended that the legislative power is not absolutely vested? That the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that 'the executive power *shall be vested* in a President of the United States of America.' Could Congress vest it in any other person? or is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support, in reference to the judicial department?

§ 1592. "If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others.

§ 1593. "The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a Supreme Court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If Congress may lawfully omit to establish inferior courts, it might follow that, in some of the enumerated cases, the judicial power could nowhere exist. The Supreme Court can have original jurisdiction in two classes of cases only, viz., in cases affecting ambassadors, other public ministers and consuls, and in cases in which a State is a party. Congress cannot vest any portion of judicial power of the United States, except in courts ordained and established by itself; and if, in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on State courts) could not reach those cases;

and, consequently, the injunction of the Constitution that the judicial power '*shall be vested*,' would be disobeyed. It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be at all times vested, either in an original or appellate form, in some courts created under its authority.

§ 1594. "This construction will be fortified by an attentive examination of the second section of the third article. The words are, 'the judicial power *shall extend*,' &c. Much minute and elaborate criticism has been employed upon these words. It has been argued, that they are equivalent to the words 'may extend,' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted, for the American *people* had not made any previous grant. The Constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between States; and its structure and powers were wholly unlike those of the national government. The Constitution was an act of the people of the United States to supersede the confederation, and not to be ingrafted on it, as a stock through which it was to receive life and nourishment.

§ 1595. "If, indeed, the relative signification could be fixed upon the term 'extend,' it would not, as we shall hereafter see, subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words, 'shall extend,' is strengthened by the context. It is declared that 'in all cases affecting ambassadors, &c., the Supreme Court *shall have* original jurisdiction.' Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds: 'In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact,

with such exceptions and under such regulations as the Congress shall make.' The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might from time to time require.

§ 1596. "Other clauses in the Constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised." We shall presently see the important bearing which this reasoning has upon the interpretation of that section of the Constitution which concerns the jurisdiction of the national tribunals.

§ 1597. The Constitution has wisely established, that there shall be one Supreme Court, with a view to uniformity of decision in all cases whatsoever belonging to the judicial department, whether they arise at the common law, or in equity, or within the admiralty and prize jurisdiction; whether they respect the doctrines of mere municipal law, or constitutional law, or the law of nations. It is obvious that if there were independent Supreme Courts of common law, of equity, and of admiralty, a diversity of judgment might, and almost necessarily would spring up, not only as to the limits of the jurisdiction of each tribunal, but as to the fundamental doctrines of municipal, constitutional, and public law. The effect of this diversity would be, that a different rule would or might be promulgated on the most interesting subjects by the several tribunals; and thus the citizens be involved in endless doubts, not only as to their private rights, but as to their public duties. The Constitution itself would or

§ 1600. The next consideration is, the tenure by which the judges hold their offices. It is declared that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior."¹ Upon this subject the Federalist has spoken with so much clearness and force, that little can be added to its reasoning. "The standard of good behavior, for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. Whoever attentively considers the different departments of power, must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.

became licentious, says Montesquieu, the office became corrupt. The popular elections did very well, as he observes, so long as the people were free, and magnanimous, and virtuous, and the public was without corruption. But all plans of government which suppose the people will always act with wisdom and integrity, are plainly Utopian, and contrary to uniform experience. Government must be framed for man as he is, and not for man as he would be if he were free from vice. Without referring to those cases in our own country where judges have been annually elected by a popular assembly, we may take the less invidious case of Sweden. During the diets which preceded the revolution of 1722, the states of the kingdom sometimes appointed commissioners to act as judges. The strongest party, says Catteau, prevailed in the trials that came before them; and persons condemned by one tribunal were acquitted by another." 1 Kent's Comm. Lect. 14, pp. 273, 274 (2d edition, pp. 291, 292).

¹ For the interpretation of the meaning of the words *good behavior*, see the judgment of Lord Holt, in *Harcourt v. Fox*, 1 Shower's R. 426, 506, 536; s. c. Shower's Cases in Parl. 158.

§ 1601. "This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislature and executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that, as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; that, as nothing can contribute so much to its firmness and independence as *permanency in office*, this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the *citadel* of the public justice and the public security.

§ 1602. "If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though, I trust, the friends of the proposed Constitution will never concur with its enemies

in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty, as faithful guardians of the Constitution, where legislative invasions of it have been instigated by the major voice of the community.

§ 1603. "But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill-humors in the society. These sometimes extend no further than to the injury of the private rights of particular classes of citizens by unjust and partial laws. Here, also, the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motive of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the

virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

§ 1604. "That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

§ 1605. "There is yet a further and a weighty reason for the permanency of judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. And it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And, making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite

integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

§ 1606. "Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of judicial offices in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution."

§ 1607. These remarks will derive additional strength and confirmation from a nearer survey of the judicial branch of foreign governments as well as of the several States composing the Union. In England, the king is considered as the fountain of justice; not indeed as the author, but as the distributor of it; and he possesses the exclusive prerogative of erecting courts of judicature, and appointing the judges.¹ Indeed, in early times, the kings of England often in person heard and decided causes between party and party. But as the constitution of government became more settled, the whole judicial power was delegated to the judges of the several courts of justice; and any attempt, on the part of the king, now to exercise it in person, would be deemed a usurpation.² Anciently, the English judges held their offices according to the tenure of their commissions, as prescribed by the crown, which was generally during the pleasure of the

¹ 1 Black. Comm. 267; 2 Hawk. B. 2, ch. 1, §§ 1, 2, 3; Comm. Dig. *Prerogative*, D. 28; Id. *Courts*, A.; Id. *Officers*, A.; Id. *Justices*, A.

² Ibid.; 1 Woodes. Lect. III. p. 87; 4 Inst. 70, 71; 2 Hawk. B. 2, ch. 1, §§ 2, 3; 1 Black. Comm. 41, and note by Christian.

crown, as is the tenure of office of the Lord Chancellor, the judges of the Courts of Admiralty, and others, down to the present day. In the time of Lord Coke, the barons of the Exchequer held their offices during good behavior, while the judges of the other courts of common law held them only during pleasure.¹ And it has been said, that, at the time of the restoration of Charles the Second, the commissions of the judges were during good behavior.² Still, however, it was at the pleasure of the crown to prescribe what tenure of office it might choose, until after the revolution of 1688; and there can be no doubt that a monarch so profligate as Charles the Second would avail himself of the prerogative as often as it suited his political or other objects.

§ 1608. It is certain that this power of the crown must have produced an influence upon the administration dangerous to private rights, and subversive of the public liberties of the subjects. In political accusations, in an especial manner, it must often have produced the most disgraceful compliances with the wishes of the crown, and the most humiliating surrenders of the rights of the accused.³ The statute of 13 Will. III. ch. 2, provided that the commissions of the judges of the courts of common law should not be, as formerly, *durante bene placito*, but should be *quam diu bene se gesserint*, and their salaries be ascertained and established. They were made removable, however, by the King, upon the address of both houses of Parliament, and their offices expired by the demise of the King. Afterwards, by a statute enacted in the reign of George the Third, at the earnest recommendation of the King, a noble improvement was made in the law, by which the judges are to hold their offices during good behavior, notwithstanding any demise of the crown; and their full salaries are secured to them during the continuance of their commissions.⁴ Upon that occasion the monarch made a declaration worthy of perpetual remembrance, that "he looked upon the independence and uprightness of the judges as essential to the

¹ 4 Coke, Inst. ch. 12, p. 117; Id. ch. 7, p. 75. The tenure of office of the Attorney and Solicitor-General was at this period during good behavior. 4 Coke, Inst. 117.

² 1 Kent's Comm. Lect. 14, p. 275.

³ See De Lolme, B. 2, ch. 16, pp. 350 to 354, 362. The State Trials before the year 1688 exhibit the most gross and painful illustrations of these remarks. Subserviency to the crown was so general in State prosecutions, that it ceased almost to attract public indignation.

⁴ 1 Black. Comm. 267, 268.

impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown.”¹ Indeed, since the independence of the judges has been secured by this permanent duration of office, the administration of justice has, with a single exception,² flowed on in England with an uninterrupted, and pure, and unstained current. It is due to the enlightened tribunals of that nation to declare, that their learning, integrity, and impartiality have commanded the reverence and respect as well of America as Europe.³ The judges of the old parliaments of France (the judicial tribunals of that country) were before the revolution appointed by the crown; but they held their offices for life; and this tenure of office gave them substantial independence. Appointed by the monarch, they were considered as nearly out of his power. The most determined exertions of that authority against them only showed their radical independence. They composed permanent bodies politic, constituted to resist arbitrary innovation; and from that corporate constitution, and from most of their powers, they were well calculated to afford both certainty and stability to the laws. They had been a safe asylum to secure their laws in all the revolutions of human opinion. They had saved that sacred deposit of the country during the reigns of arbitrary princes and the struggles of arbitrary factions. They kept alive the memory and record of the Constitution. They were the great security to private property, which might be said (when personal liberty had no existence) to be as well-guarded in France as in any other country.⁴

§ 1609. The importance of a permanent tenure of office to secure the independence, integrity, and impartiality of judges, was early understood in France. Louis the Eleventh, in 1467, made a memorable declaration, that the judges ought not to be deposed or deprived of their offices but for a forfeiture previously adjudged and judicially declared by a competent tribunal. The same declaration was often confirmed by his successors; and after

¹ 1 Black. Comm. 267, 268.

² Lord Macclesfield.

³ De Lolme has dwelt on this subject with abundant satisfaction. De Lolme, B. 2, ch. 16, pp. 363 to 365. The Eulogy of Emerigon has been often quoted, and indeed is as true as it is striking. 2 Emerigon, 67, cited in 1 Marshall on Insurance, Preliminary Discourse, p. 30, note.

⁴ This is the very language of Mr. Burke in his Reflections on the French Revolution. See also De Lolme, B. 1, ch. 12, p. 159, note.

the first excesses of the French revolution were passed, the same principle obtained a public sanction. And it has now become incorporated as a fundamental principle into the present charter of France, that the judges appointed by the crown shall be irremovable.¹ Other European nations have followed the same example;² and it is highly probable that as the principles of free governments prevail the necessity of thus establishing the independence of the judiciary will be generally felt and firmly provided for.³

§ 1610. It has sometimes been suggested that, though in monarchical governments the independence of the judiciary is essential to guard the rights of the subjects from the injustice and oppression of the crown, yet that the same reasons do not apply to a republic, where the popular will is sufficiently known, and ought always to be obeyed.⁴ A little consideration of the subject will satisfy us that, so far from this being true, the reasons in favor of the independence of the judiciary apply with augmented force to republics; and especially to such as possess a written constitution, with defined powers and limited rights.

§ 1611. In the first place, factions and parties are quite as common and quite as violent in republics as in monarchies; and the same safeguards are as indispensable in the one as in the

¹ Merlin's Répertoire, art. *Juge*, No. 3.

² 1 Kent's Comm. Lect. 14, p. 275.

³ Dr. Paley's remarks on this subject are not the least valuable of his excellent writings. "The next security for the impartial administration of justice, especially in decisions to which government is a party, is the independency of the judges. As protection against every illegal attack upon the rights of the subject by the servants of the crown is to be sought for from these tribunals, the judges of the land become not unfrequently the arbiters between the king and the people; on which account they ought to be independent of either; or, what is the same thing, equally dependent upon both; that is, if they be appointed by the one, they should be removable only by the other. This was the policy which dictated the memorable improvement in our constitution, by which the judges, who before the revolution held their offices during the pleasure of the king, can now be deprived of them only by an address from both houses of Parliament, as the most regular, solemn, and authentic way by which the dissatisfaction of the people can be expressed. To make this independency of the judges complete, the public salaries of their office ought not only to be certain both in amount and continuance, but so liberal as to secure their integrity from the temptation of secret bribes; which liberality will answer also the further purpose of preserving their jurisdiction from contempt, and their characters from suspicion; as well as of rendering the office worthy of the ambition of men of eminence in their profession."

⁴ 4 Jefferson's Corresp. 287, 288, 289, 316, 352.

other against the encroachments of party spirit and the tyranny of factions. Laws, however wholesome or necessary, are frequently the objects of temporary aversion and popular odium, and sometimes of popular resistance.¹ Nothing is more facile in republics than for demagogues, under artful pretences, to stir up combinations against the regular exercise of authority. Their selfish puposes are too often interrupted by the firmness and independence of upright magistrates, not to make them at all times hostile to a power which rebukes and an impartiality which condemns them. The judiciary, as the weakest point in the Constitution on which to make an attack, is therefore constantly that to which they direct their assaults; and a triumph here, aided by any momentary popular encouragement, achieves a lasting victory over the Constitution itself. Hence, in republics, those who are to profit by public commotions or the prevalence of faction, are always the enemies of a regular and independent administration of justice. They spread all sorts of delusion, in order to mislead the public mind and excite the public prejudices. They know full well that without the aid of the people their schemes must prove abortive; and they therefore employ every art to undermine the public confidence, and to make the people the instruments of subverting their own rights and liberties.

§ 1612. It is obvious that, under such circumstances, if the tenure of office of the judges is not permanent, they will soon be rendered odious, not because they do wrong, but because they refuse to do wrong; and they will be made to give way to others, who shall become more pliant tools of the leading demagogues of the day. There can be no security for the minority in a free government except through the judicial department. In a monarchy, the sympathies of the people are naturally enlisted against the meditated oppressions of their ruler; and they screen his victims from his vengeance. His is the cause of one against the community. But in free governments, where the majority who obtain power for the moment are supposed to represent the will of the people, persecution, especially of a political nature, becomes the cause of the community against one. It is the more violent and unrelenting, because it is deemed indispensable to attain power, or to enjoy the fruits of victory. In free governments, therefore, the independence of the judiciary becomes far more important to the

¹ 1 Kent's Comm. Lect. 14, p. 275.

security of the rights of the citizens than in a monarchy; since it is the only barrier against the oppressions of a dominant faction, armed for the moment with power, and abusing the influence acquired under accidental excitements to overthrow the institutions and liberties which have been the deliberate choice of the people.¹

§ 1613. In the next place, the independence of the judiciary is indispensable to secure the people against the intentional, as well as unintentional, usurpations of the executive and legislative departments. It has been observed with great sagacity, that power is perpetually stealing from the many to the few; and the tendency of the legislative department to absorb all the other powers of the government has always been dwelt upon by statesmen and patriots as a general truth, confirmed by all human experience.² If the judges are appointed at short intervals, either by the legislative or the executive department, they will naturally, and, indeed, almost necessarily, become mere dependents upon the appointing power. If they have any desire to obtain, or to hold office, they will at all times evince a desire to follow and obey the will of the predominant power in the state. Justice will be administered with a faltering and feeble hand. It will secure nothing but its own place, and the approbation of those who value, because they control it. It will decree what best suits the opinions of the day, and it will forget that the precepts of the law rest on eternal foundations. The rulers and the citizens will not stand upon an equal ground in litigations. The favorites of the day will overawe by their power, or seduce by their influence; and thus the fundamental maxim of a republic, that it is a government of laws and not of men, will be silently disproved or openly abandoned.³

§ 1614. In the next place, these considerations acquire, as has been already seen, still more cogency and force when applied to questions of constitutional law. In monarchies, the only practi-

¹ 1 Kent's Comm. Lect. 14, pp. 275, 276.

² 1 Wilson's Law Lect. 461, 462, 463.

³ It is far from being true, that the gross misconduct of the English judges in many state prosecutions, while they held their offices during the pleasure of the crown, was in compliance only with the mere will of the monarch. On the contrary, they administered but too keenly to popular vengeance, acting under delusions of an extraordinary nature, sometimes political, sometimes religious, and sometimes arising from temporary prejudices.

cal resistance which the judiciary can present, is to the usurpations of a single department of the government, unaided, and acting for itself. But if the executive and legislative departments are combined in any course of measures, obedience to their will become a duty as well as a necessity. Thus, even in the free government of Great Britain, an act of Parliament, combining as it does the will of the crown and of the legislature, is absolute and omnipotent. It cannot be lawfully resisted or disobeyed. The judiciary is bound to carry it into effect at every hazard, even though it should subvert private rights and public liberty.¹ But it is far otherwise in a republic like our own, with a limited constitution prescribing at once the powers of the rulers and the rights of the citizens.² This very circumstance would seem conclusively to show, that the independence of the judiciary is absolutely indispensable to preserve the balance of such a constitution. In no other way can there be any practical restraint upon the acts of the government, or any practical enforcement of the rights of the citizens.³ This subject has been already examined very much at large, and needs only to be touched in this place. No man can deny the necessity of a judiciary to interpret the Constitution and laws, and to preserve the citizens against oppression and usurpation in civil and criminal prosecutions. Does it not follow, that, to enable the judiciary to fulfil its functions, it is indispensable that the judges should not hold their offices at the mere pleasure of those whose acts they are to check, and, if need be, to declare void? Can it be supposed for a moment, that men holding their offices for the

¹ See 1 Black. Comm. 9; Woodeson's Elements of Jurisprudence; Lect. 3, p. 48.

² 1 Wilson's Law Lect. 460, 461.

³ The remarks of Mr. Boudinot on this subject, in a debate in the House of Representatives, deserves insertion in this place, from his high character for wisdom and patriotism. "It has been objected," says he, "that by adopting the bill before us, we expose the measure to be considered and defeated by the judiciary of the United States, who may adjudge it to be contrary to the Constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness. I am so far from controverting this right in the judiciary, that it is my boast and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect that, if from inattention, want of precision, or any other defect, I should do wrong, there is a power in the government which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the Constitution, that there is a remedy for the failures even of the legislature itself." 1 Wilson's Law Lect. 462, 463.

short period of two, or four, or even six years, will be generally found firm enough to resist the will of those who appoint them, and may remove them?

§ 1615. The argument of those who contend for a short period of office of the judges, is founded upon the necessity of a conformity to the will of the people. But the argument proceeds upon a fallacy, in supposing that the will of the rulers and the will of the people are the same. Now they not only may be but often actually are in direct variance to each other. No man in a republican government can doubt that the will of the people is and ought to be supreme. But it is the deliberate will of the people, evinced by their solemn acts, and not the momentary ebullitions of those who act for the majority for a day, or a month, or a year. The Constitution is the will, the deliberate will of the people. They have declared under what circumstances and in what manner it shall be amended and altered; and until a change is effected in the manner prescribed, it is declared that it shall be the supreme law of the land, to which all persons, rulers as well as citizens, must bow in obedience. When it is constitutionally altered, then, and not until then, are the judges at liberty to disregard its original injunctions. When, therefore, the argument is pressed that the judges ought to be subject to the will of the people, no one doubts the propriety of the doctrine in its true and legitimate sense.

§ 1616. But those who press the argument use it in a far broader sense. In their view, the will of the people, as exhibited in the choice of the rulers, is to be followed. If the rulers interpret the Constitution differently from the judges, the former are to be obeyed, because they represent the opinions of the people; and therefore the judges ought to be removable, or appointed for a short period, so as to become subject to the will of the people, as expressed by and through their rulers. But is it not at once seen that this is in fact subverting the Constitution? Would it not make the Constitution an instrument of flexible and changeable interpretation, and not a settled form of government, with fixed limitations? Would it not become, instead of a supreme law for ourselves and our posterity, a mere oracle of the powers of the rulers of the day, to which implicit homage is to be paid, and speaking at different times the most opposite commands, and in the most ambiguous voices? In short, is not this an attempt

to erect behind the Constitution a power unknown and unprovided for by the Constitution, and greater than itself? What becomes of the limitations of the Constitution, if the will of the people, thus inofficially promulgated, forms, for the time being, the supreme law and the supreme exposition of the law? If the Constitution defines the powers of the government, and points out the mode of changing them, and yet the instrument is to expand in the hands of one set of rulers, and to contract in those of another, where is the standard? If the will of the people is to govern in the construction of the powers of the Constitution, and that will is to be gathered at every successive election at the polls, and not from their deliberate judgment and solemn acts in ratifying the Constitution, or in amending it, what certainty can there be in those powers? If the Constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to prevail, the first or the last? When, therefore, it is said that the judges ought to be subjected to the will of the people, and to conform to their interpretation of the Constitution, the practical meaning must be that they should be subjected to the control of the representatives of the people in the executive and legislative departments, and should interpret the Constitution as the latter may from time to time deem correct.

§ 1617. But it is obvious that elections can rarely, if ever, furnish any sufficient proofs what is deliberately the will of the people as to any constitutional or legal doctrines. Representatives and rulers must be ordinarily chosen for very different purposes, and, in many instances, their opinions upon constitutional questions must be unknown to their constituents. The only means known to the Constitution, by which to ascertain the will of the people upon a constitutional question, is in the shape of an affirmative or negative proposition by way of amendment, offered for their adoption in the mode prescribed by the Constitution. The elections in one year may bring one party into power, and, in the next year, their opponents, embracing opposite doctrines, may succeed; and so alternate success and defeat may perpetually recur in the same districts, and in the same or different States.

§ 1618. Surely it will not be pretended that any constitution adapted to the American people could ever contemplate the ex-

ecutive and legislative departments of the government as the ultimate depositaries of the power to interpret the Constitution, or as the ultimate representatives of the will of the people to change it at pleasure. If, then, the judges were appointed for two, or four, or six years, instead of during good behavior, the only security which the people would have for a due administration of public justice and a firm support of the Constitution would be, that being dependent upon the executive for their appointment during their brief period of office, they might and would represent more fully, for the time being, the constitutional opinion of each successive executive, and thus carry into effect his system of government. Would this be more wise, or more safe, more for the permanence of the Constitution or the preservation of the liberties of the people, than the present system? Would the judiciary then be, in fact, an independent co-ordinate department? Would it protect the people against an ambitious or corrupt executive, or restrain the legislature from acts of unconstitutional authority? ¹

§ 1619. The truth is, that even with the most secure tenure of office during good behavior, the danger is not that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties, but that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day. In a monarchy, the judges, in the performance of their duties with uprightness and impartiality, will always have the support of some of the departments of the government, or at least of the people. In republics, they may sometimes find the other departments combined in hostility against the judicial; and even the people for a while, under the influence of party spirit and

¹ Mr. Jefferson, during the latter years of his life, and indeed from the time when he became President of the United States, was a most strenuous advocate of the plan of making the judges hold their offices for a limited term of years only. He proposed, that their appointments should be for *four* or *six* years, renewable by the President and Senate. It is not my purpose to bring his opinions into review, or to comment on the terms in which they are expressed. It is impossible not to perceive that he entertained a decided hostility to the judicial department, and that he allowed himself in language of insinuation against the conduct of judges, which is little calculated to add weight to his opinions. He wrote on this subject apparently with the feelings of a partisan, and under influences which his best friends will most regret. See 1 Jefferson's Corresp. 65, 66; 4 Jefferson's Corresp. 74, 75, 287, 288, 289, 317, 337, 352. His earlier opinions were of a different character. See Jefferson's Notes on Virginia, 195; Federalist, No. 48.

turbulent factions, ready to abandon them to their fate.¹ Few men possess the firmness to resist the torrent of popular opinion; or are content to sacrifice present ease and public favor in order to earn the slow rewards of a conscientious discharge of duty; the sure but distant gratitude of the people; and the severe but enlightened award of posterity.²

¹ An objection was taken in the Pennsylvania convention against the Constitution of the United States, that the judges were not made sufficiently independent, because they might hold other offices. 3 Elliot's Debates, 300, 313, 314.

² Mr. (now Judge) Hopkinson has treated this subject, as he has treated every other falling within the range of his forensic or literary labors, in a masterly manner. I extract the following passages from his defence of Mr. Justice Chase, upon his impeachment, as equally remarkable for truth, wisdom, and eloquence.

"The pure and upright administration of justice is of the utmost importance to any people; the other movements of government are not of such universal concern. Who shall be President, or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies, the administration of law between man and man, the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favor or fear from any quarter, the situation of a people can never be very uncomfortable or unsafe. But if a judge is forever to be exposed to prosecutions and impeachments for his official conduct on the mere suggestions of caprice, and to be condemned by the mere voice of prejudice, under the specious name of common sense, can he hold that firm and steady hand his high functions require? No; if his nerves are of iron, they must tremble in so perilous a situation. In England, the complete independence of the judiciary has been considered, and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that in our republican institution the same reasons for it do not exist; that it is, indeed, inconsistent with the nature of our government, that any part or branch of it should be independent of the people, from whom the power is derived. And, as the House of Representatives comes most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this.

"If I were called upon to declare whether the independence of judges were more essentially important in a monarchy or a republic, I should certainly say in the latter. All governments require, in order to give them firmness, stability, and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions; nothing can be relied upon; no faith can be given, either at home or abroad, to a people, whose systems, and operations, and policy are

§ 1620. If, passing from general reasoning, an appeal is made to the lessons of experience, there is everything to convince us that the judicial department is safe to a republic with the tenure of office during good behavior; and that justice will ordinarily be best administered where there is most independence. Of the State constitutions, five only out of twenty-four have provided for any other tenure of office than during good behavior; and those adopted by the new States admitted into the Union since the formation of the national government have, with two or three exceptions only, embraced the same permanent tenure of office.¹ (a) No one can hesitate to declare that in the States where the judges hold their offices during good behavior, justice is administered with wisdom, moderation, and firmness; and that the public confidence has reposed upon the judicial department in the most critical times, with unabated respect. If the same can be said in regard to other States, where the judges enjoy a less permanent tenure of office, it will not answer the reasoning, unless it can also be shown that the judges have never been removed for political causes wholly distinct from their own merit, and yet have often deliberately placed themselves in opposition to the popular opinion.²

constantly changing with popular opinion. If, however, the judiciary is stable and independent; if the rule of justice between men rests on permanent and known principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world and in its own internal concerns. This independence is further requisite as a security from oppression. History demonstrates from page to page that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics, both ancient and modern; with this difference, — that in the latter the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued, as an ingredient and principle of the government; the people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue; but, while the fit is on, their devastation and cruelty is more terrible and unbounded than the most monstrous tyrant. It is for their own benefit, and to protect them from the violence of their own passions, that it is essential to have some firm, unshaken, independent branch of government, able and willing to resist their frenzy; if we have read of the death of Seneca under the ferocity of a Nero, we have read too of the murder of a Socrates under the delusion of a republic. An independent and firm judiciary, protected and protecting by the laws, would have snatched the one from the fury of a despot, and preserved the other from the madness of a people." 2 Chase's Trial, 18, 19, 20.

¹ Dr. Lieber's *Encyclopedia Americana*, Art. *Constitutions of the United States*.

² It affords me very great satisfaction to be able to cite the opinions of two eminent

(a) At the present time the judges in periods only, and generally by popular most of the States are chosen for limited vote.

§ 1621. The considerations above stated lead to the conclusion that in republics there are, in reality, stronger reasons for an

commentators on this subject, who, differing in many other views of constitutional law, concur in upholding the necessity of an independent judiciary in a republic. Mr. Chancellor Kent, in his Commentaries, says :—

“ In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown ; but in republics it is equally salutary in protecting the Constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts ; and, to give them the firmness to do it, the judges ought to be confident of the security of their stations. Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of passion or the temptations of interest, to make a sacrifice of constitutional rights ; and it is a wise and necessary principle of our government, as will be shown hereafter in the course of these lectures, that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the Constitution as the paramount law, and the highest evidence of the will of the people.” 1 Kent's Comm. Lect. 14, pp. 293, 294.

Mr. Tucker, in his Commentaries, makes the following remarks :—

“ The American constitutions appear to be the first in which this absolute independence of the judiciary has formed one of the fundamental principles of the government. Dr. Rutherford considers the judiciary as a branch only of the executive authority ; and such, in strictness, perhaps it is in other countries, its province being to advise the executive, rather than to act independently of it. . . . But in the United States of America, the judicial power is a distinct, separate, independent, and *co-ordinate* branch of the government ; expressly recognized as such in our State bill of rights and constitution, and demonstrably so, likewise, by the federal Constitution, from which the courts of the United States derive all their powers, in like manner as the legislative and executive departments derive theirs. The obligation which the Constitution imposes upon the judiciary department to support the Constitution of the United States would be nugatory if it were dependent upon either of the other branches of the government, or in any manner subject to their control, since such control might operate to the destruction instead of the support of the Constitution. Nor can it escape observation, that to require such an oath on the part of the judges, on the one hand, and yet to suppose them bound by acts of the legislature, which may violate the Constitution which they have sworn to support, carries with it such a degree of impiety, as well as absurdity, as no man, who pays any regard to the obligations of an oath, can be supposed either to contend for, or to defend.

“ This absolute independence of the judiciary, both of the executive and the legislative departments, which I contend is to be found both in the letter and spirit of our constitutions, is not less necessary to the liberty and security of the citizen and his property in a republican government than in a monarchy. If, in the latter, the will of the prince may be considered as likely to influence the conduct of judges created occasionally, and holding their offices only during his pleasure, more especially in cases where a criminal prosecution may be carried on by his orders and supported by his influence ; in a republic, on the other hand, the violence and malignity of party spirit, as well in the legislature as in the executive, requires not less the intervention of a calm, temperate, and independent judiciary, to prevent that violence and malignity

independent tenure of office by the judges, a tenure during good behavior, than in a monarchy. Indeed, a republic, with a limited constitution, and yet without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd as a

from exerting itself 'to crush in dust and ashes' all opponents to its tyrannical administration or ambitious projects. Such an independence can never be perfectly attained but by a *constitutional tenure of office*, equally independent of the frowns and smiles of the other branches of the government. Judges ought not only to be incapable of holding any other office at the same time, but even of appointment to any but a judicial office. For the hope of favor is always more alluring, and generally more dangerous, than the fear of offending. In England, according to the principles of the common law, a judge cannot hold any other office; and, according to the practice there for more than a century, no instance can, I believe, be shown, where a judge has been appointed to any other than a judicial office, unless it be the honorary post of privy councillor, to which no emolument is attached. And even this honorary distinction is seldom conferred but upon the chief justice of the King's Bench, if I have been rightly informed. To this cause, not less than to the tenure of their offices *during good behavior*, may we ascribe that pre-eminent integrity which, amidst surrounding corruption, beams with genuine lustre from the English courts of judicature, as from the sun through surrounding clouds and mists. To emulate both their wisdom and integrity is an ambition worthy of the greatest characters in any country.

"If we consider the nature of the judicial authority, and the manner in which it operates, we shall discover that it cannot, of itself, oppress any individual; for the executive authority must lend its aid in every instance where oppression can ensue from its decisions; whilst, on the contrary, its decisions in favor of the citizen are carried into instantaneous effect, by delivering him from the custody and restraint of the executive officer the moment that an acquittal is pronounced. And herein consists one of the great excellencies of our Constitution, that no individual can be oppressed whilst this branch of the government remains independent and uncorrupted; it being a necessary check upon the encroachments or usurpations of power by either of the other.

"That absolute independence of the judiciary, for which we contend, is not, then, incompatible with the strictest responsibility (for a judge is no more exempt from it than any other servant of the people, according to the true principles of the Constitution); but such an independence of the other *co-ordinate* branches of the government as seems absolutely necessary to secure to them the free exercise of their constitutional functions, without the hope of pleasing or the fear of offending. And as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches, who have the custody of the purse and sword of the confederacy; and, as nothing can contribute so much to its firmness and independence as permanency in office, this quality, therefore, may be justly regarded as an indispensable ingredient in its constitution, and, in great measure, as the citadel of the public justice and the public security." 1 Tuck. Black. Comm. App. 354, 356 to 360.

There is also a very temperate, and, at the same time, a very satisfactory elucidation of the same subject in Mr. Rawle's work on the Constitution (ch. 30). It would be cheerfully extracted, if this note had not already been extended to an inconvenient length.

society organized without any restraints of law. It would become a democracy with unlimited powers, exercising, through its rulers, a universal despotic sovereignty. The very theory of a balanced republic of restricted powers presupposes some organized means to control and resist any excesses of authority. The people may, if they please, submit all power to their rulers for the time being; but then the government should receive its true appellation and character. It would be a government of tyrants, elective, it is true, but still tyrants; and it would become the more fierce, vindictive, and sanguinary, because it would perpetually generate factions in its own bosom, who could succeed only by the ruin of their enemies. It would be alternately characterized as a reign of terror and a reign of imbecility. It would be as corrupt as it would be dangerous. It would form another model of that profligate and bloody democracy, which, at one time, in the French revolution, darkened by its deeds the fortunes of France, and left to mankind the appalling lesson, that virtue and religion, genius and learning, the authority of wisdom and the appeals of innocence, are unheard and unfelt in the frenzy of popular excitement; and that the worst crimes may be sanctioned, and the most desolating principles inculcated, under the banners and in the name of liberty. In human government there are but two controlling powers,—the power of arms, and the power of laws. If the latter are not enforced by a judiciary above all fear and above all reproach, the former must prevail, and thus lead to the triumph of military over civil institutions. The framers of the Constitution, with profound wisdom, laid the corner-stone of our national republic in the permanent independence of the judicial establishment. Upon this point their vote was unanimous.¹ They adopted the results of an enlightened experience. They were not seduced, by the dreams of human perfection, into the belief that all power might be safely left to the unchecked operation of the private ambition or personal virtue of rulers. Nor, on the other hand, were they so lost to a just estimate of human concerns, as not to feel that confidence must be reposed somewhere, if either efficiency or safety is to be consulted in the plan of government. Having provided amply for the legislative and executive authorities, they established a balance-wheel, which, by its independent structure, should adjust

¹ Journal of Convention, 100, 188.

the irregularities and check the excesses of the occasional movements of the system.

§ 1622. In the convention, a proposition was offered to make the judges removable by the President, upon the application of the Senate and House of Representatives; but it received the support of a single State only.¹

§ 1623. This proposition, doubtless, owed its origin to the clause in the act of Parliament (13 Will. III. ch. 2) making it lawful for the King to remove the judges on the address of both houses of Parliament, notwithstanding the tenure of their offices during good behavior established by the same act.² But a moment's reflection will teach us that there is no just analogy in the cases. The object of the act of Parliament was to secure the judges from removal at the mere pleasure of the crown; but not to render them independent of the action of Parliament. By the theory of the British constitution, every act of Parliament is supreme and omnipotent. It may change the succession to the crown, and even the very fundamentals of the constitution. It would have been absurd, therefore, to have exempted the judges alone from the general jurisdiction of the supreme authority in the realm. The clause was not introduced into the act for the purpose of conferring the power on Parliament, for it could not be taken away or restricted; but simply to recognize it, as a qualification of the tenure of office; so that the judges should have no right to complain of any breach of an implied contract with them, and the crown should not be deprived of the means to remove an unfit judge, whenever Parliament should, in their discretion, signify their assent. Besides, in England the judges are not and cannot be called upon to decide any constitutional questions; and, therefore, there was no necessity to place them, and indeed there would have been an impropriety in placing them, even if it had been possible (which it clearly was not), in a situation in which they would not have been under the control of Parliament.

§ 1624. Far different is the situation of the people of the United States. They have chosen to establish a constitution of government with limited powers and prerogatives, over which neither the executive nor the legislature has any power, either of alteration or control. It is to all the departments equally a

¹ Journal of Convention, 296.

² 1 Black. Comm. 266.

supreme, fundamental, unchangeable law, which all must obey, and none are at liberty to disregard. The main security relied on to check any irregular or unconstitutional measure, either of the executive or the legislative department, was, as we have seen, the judiciary. To have made the judges, therefore, removable at the pleasure of the President and Congress, would have been a virtual surrender to them of the custody and appointment of the guardians of the Constitution. It would have been placing the keys of the citadel in the possession of those against whose assaults the people were most strenuously endeavoring to guard themselves. It would be holding out a temptation to the President and Congress, whenever they were resisted in any of their measures, to secure a perfect irresponsibility, by removing those judges from office who should dare to oppose their will. In short, in every violent political commotion or change, the judges would be removed from office, exactly as the Lord Chancellor in England now is, in order that a perfect harmony might be established between the operations of all the departments of government. Such a power would have been a signal proof of a solicitude to erect defences round the Constitution, for the sole purpose of surrendering them into the possession of those whose acts they were intended to guard against. Under such circumstances, it might well have been asked, where could resort be had to redress grievances or to overthrow usurpations? *Quis custodiet custodes?*

§ 1625. A proposition of a more imposing nature was to authorize a removal of judges for inability to discharge the duties of their offices. But all considerate persons will readily perceive that such a provision would either not be practised upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has no place in the catalogue of any known art or science. An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal or party attachments and hostilities than advance the interests of justice or the public good.¹ And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision.

§ 1626. In order to avoid investigations of this sort, which must forever be vague and unsatisfactory, some persons have been

¹ The Federalist, No. 79. See Rawle on Constitution, ch. 30, pp. 278, 279.

disposed to think that a limitation of age should be assumed as a criterion of inability, so that there should be a constitutional removal from office when the judge should attain a certain age. Some of the State constitutions have adopted such a limitation. Thus, in New York, sixty years of age is a disqualification for the office of judge; and in some other States the period is prolonged to seventy. The value of these provisions has never as yet been satisfactorily established by the experience of any State. That they have worked mischievously in some cases is matter of public notoriety. The Federalist has remarked, in reference to the limitation in New York,¹ "There are few at present who do not disapprove of this provision. There is no station in which it is less proper than that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it. And when, in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigor, and how improbable it is that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent, and pensions not expedient, the dismissal of men from stations in which they have served their country long and usefully, and

¹ The limitation of New York struck from its bench one of the greatest names that ever adorned it, in the full possession of his extraordinary powers. I refer to Mr. Chancellor Kent, to whom the jurisprudence of New York owes a debt of gratitude that can never be repaid. He is at once the compeer of Hardwicke and Mansfield. Since his removal from the Bench, he has composed his admirable Commentaries,* a work which will survive as an honor to the country long after all the perishable fabrics of our day shall be buried in oblivion. If he had not thus secured an enviable fame since his retirement, the public might have had cause to regret that New York should have chosen to disfranchise her best citizens at the time when their services were most important and their judgments most mature.

Even the age of seventy would have excluded from public service some of the greatest minds which have belonged to our country. At eighty, said Mr. Jefferson, Franklin was the ornament of human nature. At eighty, Lord Mansfield still possessed in vigor his almost unrivalled powers. If seventy had been the limitation in the Constitution of the United States, the nation would have lost seven years of as brilliant judicial labors as have ever adorned the annals of the jurisprudence of any country.

* While the present work was passing through the press, a second edition has been published by the learned author; and it has been greatly improved by his severe, acute, and accurate judgment.

on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench."¹

§ 1627. It is observable, that the Constitution has declared that the judges of the inferior courts as well as of the Supreme Court of the United States shall hold their offices during good behavior. In this respect there is a marked contrast between the English government and our own. In England, the tenure is exclusively confined to the judges of the superior courts, and does not, as we have already seen, even embrace all of these. In fact, a great portion of all the civil and criminal business of the whole kingdom is performed by persons delegated *pro hac vice*, for this purpose, under commissions issued periodically for a single circuit.² It is true that it is, and for a long period has been, ordinarily administered by the judges of the courts of King's Bench, Common Pleas, and Exchequer; but it is not so merely *virtute officii*, but under special commissions, investing them from time to time with this authority, in conjunction with other persons named in the commission. Such are the commissions of oyer and terminer, of assize, of jail delivery, and of *nisi prius*, under which all civil and criminal trials of matters of fact are had at the circuits and in the metropolis.³ By the Constitution of the United States, all criminal and civil jurisdiction must be exclusively confided to judges holding their office during good behavior; and though Congress may from time to time distribute the jurisdiction among such inferior courts as it may create from time to time, and withdraw it at their pleasure, it is not competent for them to confer it upon temporary judges, or to confide it by special commission. Even if the English system be well adapted to the wants of the nation, and secure a wise and beneficent administration of justice in the realm, as it doubtless does, still it is obvious that, in our popular government, it would be quite too great a power to trust the whole administration of civil and criminal justice to commissioners appointed at the pleasure of the President. To the Constitution of the United States, and

¹ The Federalist, No. 79. See Rawle on Const. ch. 30, pp. 278, 279.

² 1 Wilson's Law Lect. 463, 464; 2 Wilson's Law Lect. 258, 259.

³ See 3 Black. Comm. 58, 59, 60.

to those who enjoy its advantages, no judges are known but such as hold their offices during good behavior.¹ (a)

§ 1628. The next clause of the Constitution declares, that the judges of the supreme and inferior courts "shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Without this provision, the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery. The Federalist has here also spoken in language so direct and convincing, that it supersedes all other argument.

§ 1629. "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any sys-

¹ 1 Wilson's Law Lect. 464, 465. Mr. Tucker has spoken with a truly national pride and feeling on the subject of the national judiciary, in comparing it with that of England. "Whatever, then, has been said," says he, "by Baron Montesquieu, De Lolme, or Judge Blackstone, or any other writer, on the security derived to the subject from the independence of the judiciary of Great Britain, will apply at least as forcibly to that of the United States. We may go still further. In England the judiciary may be overwhelmed by a combination between the executive and the legislature. In America (according to the true theory of our constitution), it is rendered absolutely independent of, and superior to, the attempts of both to control or crush it; First, by the tenure of office, which is during good behavior; these words (by a long train of decisions in England, even as far back as the reign of Edward the Third) in all commissions and grants, public or private, importing an office or estate for the life of the grantee, determinable only by his death or breach of good behavior. Secondly, by the independence of the judges in respect to their salaries, which cannot be diminished. Thirdly, by the letter of the Constitution, which defines and limits the powers of the several co-ordinate branches of the government; and the spirit of it, which forbids any attempt on the part of either to subvert the constitutional independence of the others. Lastly, by that uncontrollable authority in all cases of litigation, criminal or civil, which, from the very nature of things, is exclusively vested in this department, and extends to every supposable case which can affect the life, liberty, or property of the citizens of America, under the authority of the federal Constitution and laws, except in the case of an impeachment." 1 Tuck. Black. Comm. App. 353, 354.

(a) See Mr. Chief Justice Marshall's Discourse on his Death, page 67. See remarks in the Virginia convention of also Webster on the Independence of the 1829, respecting the tenure of the judicial Judiciary, Works, III. 26. office. They are quoted in Mr. Binney's

tem which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these, indeed, have declared that *permanent* salaries should be established for the judges; but the experiment has, in some instances, shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall, at *stated times*, receive for their services a compensation, which shall not be *diminished* during their continuance in office.'

§ 1630. "This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office in respect to him. It will be observed, that a difference has been made by the convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in

the early stages of the government, that a stipend which would be very sufficient at their first appointment would become too small in the progress of their service.

§ 1631. "This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges. The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character; and is the only one which we find in our own Constitution in respect to our own judges."¹

§ 1632. Mr. Justice Wilson also has, with manifest satisfaction, referred to the provision as giving a decided superiority to the national judges over those of England. "The laws," says he, "in England respecting the independency of the judges have been construed as confined to those in the superior courts. In the United States, this independency extends to judges in courts inferior as well as supreme. This independency reaches equally their salaries and their commissions. In England, the judges of the superior courts do not now, as they did formerly, hold their commissions and their salaries at the pleasure of the crown; but they still hold them at the pleasure of the Parliament: the judicial subsists, and may be blown to annihilation by the breath of the legislative department. In the United States, the judges

¹ Mr. Chancellor Kent has written a few brief but pregnant sentences on this subject; and he has praised the Constitution of the United States as, in this respect, an improvement upon all previously existing constitutions in this or any other country. 1 Kent's Comm. Lect. 14, p. 276. In his second edition (*Ibid.* p. 294), he has in some measure limited the generality of expression of the first, by stating that, by the English act of settlement of 12 & 13 Will. III., it was declared, that the salaries of the judges should be ascertained and *established*; and by the statute of 1 George III., the salaries of the judges were absolutely secured to them during the continuance of their commissions. See 1 Black. Comm. 267, 268. Still there remains a striking difference in favor of the American Constitution, inasmuch as in England the compensation as well as the tenure of office is within the reach of the repealing power of Parliament; but in the national government it constitutes a part of the supreme fundamental law, unalterable, except by an amendment of the Constitution.

stand upon the sure basis of the Consitution: the judicial department is independent of the department of legislature. No act of Congress can shake their commissions or reduce their salaries. 'The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.' It is not lawful for the President of the United States to remove them on the address of the two houses of Congress. They may be removed, however, as they ought to be, on conviction of high crimes and misdemeanors. The judges of the United States stand on a much more independent footing than that on which the judges of England stand, with regard to jurisdiction as well as with regard to commissions and salaries. In many cases, the jurisdiction of the judges of the United States is ascertained and secured by the Constitution. As to these, the power of the judicial is co-ordinate with that of the legislative department. As to the other cases, by the necessary result of the Constitution, the authority of the former is paramount to the authority of the latter."

§ 1633. It would be a matter of general congratulation, if this language had been completely borne out by the perusal of our juridical annals. But, unfortunately, a measure was adopted in 1802, under the auspices of President Jefferson,¹ which, if its constitutionality can be successfully vindicated, prostrates in the dust the independence of all inferior judges, both as to the tenure of their office and their compensation for services, and leaves the Constitution a miserable and vain delusion. In the year 1801, Congress passed an act² reorganizing the judiciary, and authorizing the appointment of sixteen new judges, with suitable salaries, to hold the circuit courts of the United States in the different circuits created by the act. Under this act, the circuit judges received their appointments and performed the duties of their offices until the year 1802, when the courts established by the act were abolished by a general repeal of it by Congress, without in the slightest manner providing for the payment of the salaries of the judges, or for any continuation of their offices.³ The result of this act, therefore, is, so far as it is a precedent,

¹ See Mr. Jefferson's Message, Dec. 8, 1801; 4 Wait's State Papers, p. 332.

² Act of 1801, ch. 75.

³ Act of 8th March, 1802, ch. 8.

that notwithstanding the constitutional tenure of office of the judges of the inferior courts is during good behavior, Congress may, at any time, by a mere act of legislation, deprive them of their offices at pleasure, and with it take away their whole title to their salaries.¹ How this can be reconciled with the terms or the intent of the Constitution, is more than any ingenuity of argument has ever, as yet, been able to demonstrate.² (a) The system fell, because it was unpopular with those who were then in possession of power; and the victims have hitherto remained without any indemnity from the justice of the government.

§ 1634. Upon this subject a learned commentator³ has spoken with a manliness and freedom worthy of himself and of his country. To those who are alive to the just interpretation of the Constitution; those who, on the one side, are anxious to guard it against usurpations of power, injurious to the States; and those who, on the other side, are equally anxious to prevent a prostration of any of its great departments to the authority of the others; the language can never be unseasonable, either for admonition or instruction, to warn us of the facility with which public opinion may be persuaded to yield up some of the barriers of the Constitution under temporary influences, and to teach us the duty of an unsleeping vigilance to protect that branch which, though weak in its powers, is yet the guardian of the rights and liberties of the people. "It was supposed," says the learned author, "that there could not be a doubt that those tribunals, in

¹ See Sergeant on Constitution, ch. 30 [ch. 32].

² The act gave rise to one of the most animated debates to be found in the annals of Congress; and was resisted by a power of argument and eloquence which has never been surpassed. These debates were collected and printed in a volume at Albany, in 1802, and are worthy of the most deliberate perusal of every constitutional lawyer. The act may be asserted, without fear of contradiction, to have been against the opinion of a great majority of all the ablest lawyers at the time; and probably now, when the passions of the day have subsided, few lawyers will be found to maintain the constitutionality of the act. No one can doubt the perfect authority of Congress to remodel their courts, or to confer or withdraw their jurisdiction at their pleasure. But the question is, whether they can deprive judges of the tenure of their office and their salaries after they have once become constitutionally vested in them. See 3 Tuck. Black. Comm. App. 22 to 25.

³ Mr. Tucker, 1 Tuck. Black. Comm. App. 360; 3 Tuck. Black. Comm. App. 22 to 25.

(a) Something of the views of those who defend this legislation may be seen in Van Buren, Political Parties, 304 to 307. See also Garland's Life of John Randolph, I. 188; Cocke's Const. Hist. I. 219.

which justice is to be dispensed according to the Constitution and laws of the confederacy; in which life, liberty, and property are to be decided upon; in which questions might arise as to the constitutional powers of the executive, or the constitutional obligation of an act of the legislature; and in the decision of which the judges might find themselves constrained, by duty and by their oaths, to pronounce against the authority of either, should be stable and permanent, and not dependent upon the will of the executive, or legislature, or both, for their existence;—that, without this degree of permanence, the tenure of office during good behavior could not secure to that department the necessary firmness to meet unshaken every question, and to decide as justice and the Constitution should dictate, without regard to consequences. These considerations induced an opinion, which, it was presumed, was general, if not universal, that the power vested in Congress to erect from time to time tribunals inferior to the Supreme Court did not authorize them, at pleasure, to demolish them. Being built upon the rock of the Constitution, their foundations were supposed to partake of its permanency, and to be equally incapable of being shaken by the other branches of the government. But a different construction of the Constitution has lately prevailed. It has been determined that a power to ordain and establish, from time to time, carries with it a discretionary power to discontinue or demolish,—that, although the tenure of office be *during good behavior*, this does not prevent the separation of the office from the officer, by putting down the office; but only secures to the officer his station upon the terms of good behavior, so long as the office itself remains. Painful, indeed, is the remark, that this interpretation seems calculated to subvert one of the fundamental pillars of free governments, and to have laid the foundation of one of the most dangerous political schisms that has ever happened in the United States of America.”¹

¹ Whether justices of the peace, appointed under the authority of the United States, are inferior courts within the sense of the Constitution, has been in former times a matter of some controversy, but has never been decided by the Supreme Court. They are, doubtless, officers of the government of the United States, but their duties are partly judicial, and partly executive or ministerial. *Wise v. Withers*, 8 Cranch's R. 336. In these respects they have been supposed to be like commissioners of excise, of bankruptcy, commissioners to take depositions, and commissioners under treaties. And it has been said that the Constitution, in speaking of courts

§ 1635. It is almost unnecessary to add, that although the Constitution has, with so sedulous a care, endeavored to guard the judicial department from the overwhelming influence or power of the other co-ordinate departments of the government, it has not conferred upon them any inviolability or irresponsibility for an abuse of their authority. On the contrary, for any corrupt violation or omission of the high trusts confided to the judges, they are liable to be impeached (as we have already seen), and, upon conviction, removed from office. Thus, on the one hand, a pure and independent administration of public justice is amply provided for; and, on the other hand, an urgent responsibility secured for fidelity to the people.

§ 1636. The judges of the inferior courts, spoken of in the Constitution, do not include the judges of courts appointed in the territories of the United States under the authority given to Congress to regulate the territories of the United States. The courts of the territories are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are legislative courts, created in virtue of the general sovereignty which exists in the national government over its territories. The jurisdiction with which they are invested is not a part of the judicial power which is defined in the third article of the Constitution, but arises from the same general sovereignty. In legislating for them, Congress exercises the combined powers of the general and of a State government. Congress may, therefore, rightfully limit the tenure of office of the judges of the territorial courts, as well as their jurisdiction; and it has been accordingly limited to a short period of years.¹

and judges, means those who exercise all the regular and permanent duties which belong to a court, in the ordinary popular signification of the terms. Sergeant on Const. (2d edit.) ch. 33, pp. 377, 378.

At present, the courts of the United States, organized under the Constitution, consist of district courts (one of which, at least, is established in every State in the Union), of circuit courts, and of a Supreme Court, the latter being composed of seven (a) judges. The Judiciary Act of 1789, ch. 20, and the Judiciary Act of 1802, ch. 31, are those which make the general provisions for the establishment of these courts, and for their jurisdiction, original and appellate. Mr. Chancellor Kent has given a brief but accurate account of the examination of the courts of the United States. 1 Kent's Comm. Lect. 14, pp. 279 to 285 (2d edit. pp. 298 to 305).

¹ The American Insurance Company v. Canter, 1 Peters's Sup. R. 511, 546.

(a) Now nine.

§ 1637. The second section of the third article contains an exposition of the jurisdiction appertaining to the judicial power of the national government. The first clause is as follows: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority,(a) to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."¹

§ 1638. Such is the judicial power which the Constitution has deemed essential in order to follow out one of its great objects stated in the preamble, "to establish justice." Mr. Chief Justice Jay, in his very able opinion in *Chisholm v. The State of Georgia*,² has drawn up a summary of the more general reasoning on which each of these delegations of power is founded. "It may be asked," said he, "what is the precise sense and latitude in which the words '*to establish justice*,' as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1. To all cases arising under this Constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, not by authority derived only from one of them. 2. To

¹ It has been very correctly remarked by Mr. Justice Iredell, that "the judicial power of the United States is of a peculiar kind. It is, indeed, commensurate with the ordinary legislative and executive powers of the general government, and the powers which concern treaties. But it also goes further. When certain parties are concerned, although the subject in controversy does not relate to any special objects of authority of the general government wherein the separate sovereignties of the separate States are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy; and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect." *Chisholm v. Georgia*, 2 Dall. 433, 434.

² 2 Dall. R. 419, 475.

(a) See *Tennessee v. Davis*, 100 U. S. 257.

all cases arising under the laws of the United States; because, as such laws, constitutionally made, are obligatory in each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3. To all cases arising under treaties made by their authority; because, as treaties are compacts made by and obligatory on the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect, and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others. 7. To controversies between two or more States; because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory; and because, in a free country, justice ought not to depend on the *will* of either of the litigants. 8. To controversies between a State and citizens of another State; because, in case a State (that is, all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court than in a court of the State to which those citizens belong, the danger of irritation and criminations, arising from apprehensions and suspicions of partiality, being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbids that the latter should be the sole judges of the justice due to the latter; and true republican government requires that free and equal citizens should have free, fair, and equal justice. 9. To controversies between citizens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land are drawn into

question, neither of the two States ought to decide the controversy. 10. To controversies between a State, or the citizens thereof, and foreign states, citizens, or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal rights of the people."

§ 1639. This opinion contains a clear, and, as far as it goes, an exact outline; but it will be necessary to examine separately every portion of the jurisdiction here given, in order that a more full and comprehensive understanding of all the reasons on which it is founded may be attained. And I am much mistaken if such an examination will not display in a more striking light the profound wisdom and policy with which this part of the Constitution was framed.

§ 1640. And first, the judicial power extends to all cases in law and equity, arising under the Constitution, the laws, and the treaties of the United States.¹ And by cases in this clause we are to understand criminal as well as civil cases.²

§ 1641. The propriety of the delegation of jurisdiction, in "cases arising under the Constitution," rests on the obvious consideration, that there ought always to be some constitutional method of giving effect to constitutional provisions.³ What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them?⁴ The States are, by the Constitution,

¹ In the first draft of the Constitution the clause was, "The jurisdiction of the Supreme Court shall extend to all cases arising under the laws passed by the legislature of the United States;" the other words, "the Constitution," and "treaties," were afterwards added without any apparent objection. *Journal of Convention*, 226, 297, 298.

² 1 Tuck. Black. Comm. App. 420, 421; *Cohens v. Virginia*, 6 Wheat. R. 399; Rawle on Constitution, ch. 24, p. 226.

³ *Cohens v. Virginia*, 6 Wheat. R. 415; *Id.* 402 to 404; *ante*, vol. i. §§ 266, 267.

⁴ Mr. Madison, in the Virginia Resolutions and Report, January, 1800, says that "cases arising under the Constitution," in the sense of this clause, are of two descriptions. One of these comprehends the cases growing out of the restrictions on the legislative power of the States, such as emitting bills of credit, making anything but gold and silver a tender in payment of debts. "Should this prohibition be violated,"

prohibited from doing a variety of things; some of which are incompatible with the interests of the Union; others with its peace and safety; others with the principles of good government. The imposition of duties on imported articles, the declaration of war, and the emission of paper-money, are examples of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.¹ The power must be either a direct negative on the State laws, or an authority in the national courts to overrule such as shall manifestly be in contravention to the Constitution. The latter course was thought by the convention to be preferable to the former; and it is, without question, by far the most acceptable to the States.²

says he, "and a suit *between citizens of the same State* be the consequence, this would be a case arising under the Constitution before the judicial power of the United States. A second description comprehends suits between citizens and foreigners, or citizens of different States, to be decided according to the State or foreign laws, but submitted by the Constitution to the judicial power of the United States; the judicial power being, in several instances, extended beyond the legislative power of the United States." (p. 28.) Mr. Tucker, in his Commentaries, uses the following language: "The judicial power of the federal government extends to all cases in law and equity arising under the Constitution. Now, the powers granted to the federal government, or prohibited to the States, being all enumerated, the cases arising under the *Constitution* can only be such as arise out of some *enumerated* power delegated to the federal government, or prohibited to those of the several States. These general words include what is comprehended in the next clause, namely, cases arising under the laws of the United States. But, as contradistinguished from that clause, it comprehends some cases afterwards enumerated; for example, controversies between two or more States; between a State and foreign states; between citizens of the same State claiming lands under grants of different States; all which may arise under the *Constitution*, and not under any law of the United States. Many other cases might be enumerated which would fall strictly under this clause, and no other; as, if a citizen of one State should be denied the privileges of a citizen in another; so, if a person held to service or labor in one State should escape into another and obtain protection there, as a free man; so, if a State should coin money, and declare the same to be a legal tender in payment of debt, the validity of such a tender, if made, would fall within the meaning of this clause. So also, if a State should, without the consent of Congress, lay any duty upon goods imported, the question as to the validity of such an act, if disputed, would come within the meaning of this clause, and not of any other. In all these cases equitable circumstances may arise, the cognizance of which, as well as such as were strictly legal, would belong to the federal judiciary in virtue of this clause." 1 Tuck. Black. Comm. App. 418, 419. See also 2 Elliot's Debates, 380, 383, 390, 400, 418, 419.

¹ See 3 Elliot's Debates, 142.

² The Federalist, No. 80. See also Id. No. 22; 2 Elliot's Debates, 389, 390. The reasonableness of this extent of the judicial power is very much considered by Mr.

§ 1642. The same reasoning applies with equal force to "cases arising under the laws of the United States." In fact, the necessity of uniformity in the interpretation of these laws would of itself settle every doubt that could be raised on the subject. "Thirteen independent courts of final jurisdiction," says the Federalist, "over the same causes is a hydra in government, from which nothing but contradiction and confusion can proceed."¹

§ 1643. There is still more cogency, if it be possible, in the reasoning, as applied to "cases arising under treaties made, or which shall be made, under the authority of the United States." Without this power, there would be perpetual danger of collision, and even of war, with foreign powers, and an utter incapacity to fulfil the ordinary obligations of treaties.² The want of this power was, as we have seen,³ a most mischievous defect in the confederation, and subjected the country not only to violations of its plighted faith but to the gross and almost proverbial imputation of Punic insincerity.⁴

§ 1644. But, indeed, the whole argument on this subject has been already exhausted in the preceding part of these Commentaries, and therefore it may be dismissed without further illustrations, although many humiliating proofs are to be found in the records of the confederation.⁵

Chief Justice Marshall, in delivering the opinion of the court, in *Cohens v. Virginia* (6 Wheat. R. 413 to 423), from which some extracts will be made, in considering the appellate jurisdiction of the Supreme Court, in a future page.

¹ The Federalist, No. 80 ; *Id.* No. 22 ; *Id.* No. 15 ; 2 Elliot's Debates, 389, 390 ; 3 Elliot's Debates, 142, 143. In the convention which framed the Constitution, the following resolution was unanimously adopted : "That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony." Journal of Convention, 188, 189.

² The Federalist, Nos. 22, 80 ; 2 Elliot's Debates, 390, 400 ; The Federalist, No. 80. The remarks of The Federalist, No. 80, on this subject will be found very instructive, and should be perused by every constitutional lawyer.

³ *Ante*, vol. i. §§ 266, 267, 483, 484 ; 3 Elliot's Debates, 148, 280.

⁴ 3 Elliot's Debates, 281.

⁵ *Ante*, vol. i. §§ 266, 267, 483, 484 ; The Federalist, Nos. 22, 80 ; 1 Tuck. Black. Comm. App. 418, 419, 420. This clause was opposed with great earnestness in some of the State conventions, and particularly in that of Virginia, as alarming and dangerous to the rights and liberties of the States, since it would bring everything within the vortex of the national jurisdiction. It was defended with great ability and conclusiveness of reasoning, as indispensable to the existence of the national government and perfectly consistent with the safety and prerogatives of the States. See 2 Elliot's Debates, 380 to 427 ; 3 Elliot's Debates, 125, 128, 129, 133, 143 ; *Id.* 280 ; 4 Elliot's Debates (Martin's Letter), 45.

§ 1645. It is observable, that the language is, that “the judicial power shall extend to all cases *in law and equity*,” arising under the Constitution, laws, and treaties of the United States.¹

What is to be understood by “cases in law and equity” in this clause? Plainly, cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American States were familiarly acquainted.² Here, then, at least, the Constitution of the United States appeals to and adopts the common law, to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union.³ If the remedy must be in law, or in equity, according to the course of proceedings at the common law, in cases arising under the Constitution, laws, and treaties of the United States, it would seem irresistibly to follow that the principles of decision, by which these remedies must be administered, must be derived from the same source. Hitherto such has been the uniform interpretation and mode of administering justice in civil cases in the courts of the United States in this class of cases.⁴

§ 1646. Another inquiry may be, what constitutes a *case* within the meaning of this clause? It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and

¹ See 3 Elliot's Debates, 127, 128, 129, 130, 183, 141, 143, 154.

² See Robinson v. Campbell, 3 Wheat. R. 212, 221, 223.

³ It is a curious fact, that while the adoption of the common law, as the basis of the national jurisprudence, has been in later times the subject of such deep political alarm with some statesmen, the non-existence of it, as such a basis, was originally pressed by some of the ablest opponents of the Constitution as a principal defect. Mr. George Mason, of Virginia, urged that the want of a clause in the Constitution, securing to the people the enjoyment of the common law, was a fatal defect. 2 American Museum, 534; *ante*, vol. i. p. 203. Yet the whole argument in the celebrated Resolutions of Virginia of January, 1800, supposes that the adoption of it would have been a most mischievous provision.

⁴ See Parsons v. Bedford, 3 Peters's S. C. R. 433 to 447; Robinson v. Campbell, 3 Wheat. R. 212. See Madison's Report, 7 January, 1800, pp. 28, 29; Chisholm's Executors v. Georgia, 2 Dall. R. 419, 433, 437, per Iredell, J.; The Federalist, Nos. 80, 83.

not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.¹ In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union.²

§ 1647. Cases arising under the Constitution, as contradistinguished from those arising under the laws of the United States, are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the Constitution itself, independent of any particular statute enactment. Many cases of this sort may easily be enumerated. Thus, if a citizen of one State should be denied the privileges of a citizen in another State;³ if a State should coin money, or make paper-money a tender; if a person, tried for a crime against the United States, should be denied a trial by jury, or a trial in the State where the crime is charged to be committed; if a person held to labor or service in one State, under the laws thereof, should escape into another, and there should be a refusal to deliver him up to the party to whom such service or labor may be due; in these, and many other cases, the question to be judicially decided would be a case arising under the Constitution.⁴ On the other hand, cases arising under the laws of the United States are such as grow out of the legislation of Congress, within the scope of their constitutional authority, whether they constitute the right, or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted.⁵ The same reasoning applies to cases arising under treaties. Indeed, wherever, in a judicial proceeding, any questions arise touching

¹ *Osborn v. The Bank of the United States*, 9 Wheat. R. 819. See Mr. Marshall's Speech on the case of Jonathan Robbins, Bee's Adm. R. 277; 5 Wheat. R. Appx. 16, 17.

² See 1 Tuck. Black. Comm. App. 418, 419, 420; Madison's Virginia Resolutions and Report, January, 1800, p. 28; *Marbury v. Madison*, 1 Cranch's R. 137, 173, 174; *Owning v. Norwood*, 5 Cranch, R. 344. See 2 Elliot's Debates, 418, 419.

³ The Federalist, No. 80.

⁴ 1 Tuck. Black. Comm. App. 418, 419.

⁵ *Marbury v. Madison*, 1 Cranch, 137, 173, 174.

the validity of a treaty, or statute, or authority, exercised under the United States, or touching the construction of any clause of the Constitution, or any statute or treaty of the United States, or touching the validity of any statute or authority exercised under any State, on the ground of repugnancy to the Constitution, laws, or treaties of the United States, it has been invariably held to be a case to which the judicial power of the United States extends.¹

§ 1648. It has sometimes been suggested that a case to be within the purview of this clause must be one in which a party comes into court to demand something conferred on him by the Constitution, or a law, or a treaty of the United States. But this construction is clearly too narrow. A case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the Constitution, or a law, or a treaty of the United States, whenever its correct decision depends on the construction of either. This is manifestly the construction given to the clause by Congress, by the 25th section of the Judiciary Act (which was almost contemporaneous with the Constitution), and there is no reason to doubt its solidity or correctness.² Indeed, the main object of this clause would be defeated by any narrower construction; since the power was conferred for the purpose, in an especial manner, of producing a uniformity of construction of the Constitution, laws, and treaties of the United States.³

§ 1649. This subject was a good deal discussed in a recent case⁴ before the Supreme Court, where one of the leading questions was, whether Congress could constitutionally confer upon the Bank of the United States (as it has done by the seventh section of its charter⁵) general authority to sue and to be sued in the circuit courts of the United States. It was contended that they could not, because several questions might arise in such suits which might depend upon the general principles of law,

¹ See Judiciary Act of 1789, ch. 20, § 25; *Martin v. Hunter*, 1 Wheat. R. 304; *Cohens v. Virginia*, 6 Wheat. R. 264; *Osborn v. Bank of the United States*, 9 Wheat. R. 738; *Gibbons v. Ogden*, 9 Wheat. R. 1.

² *Cohens v. Virginia*, 6 Wheat. R. 378, 379, 391, 392. See also 1 Tuck. Black. Comm. App. 419, 420; Judiciary Act of 1789, ch. 20.

³ The Federalist, No. 80; *Cohens v. Virginia*, 6 Wheat. R. 391, 392.

⁴ *Osborn v. Bank of the United States*, 9 Wheat. R. 738, 819, 820.

⁵ Act of 1816, ch. 44, § 7.

and not upon any act of Congress. It was held that Congress did constitutionally possess the power, and had rightfully conferred it in that charter.

§ 1650. The reasoning on which this decision was founded cannot be better expressed than in the very language in which it was delivered by Mr. Chief Justice Marshall. "The question," said he, "is whether it [the case] arises under a law of the United States. The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of Congress. If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the Constitution, laws, or treaties of the United States. The questions whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the Constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing."¹

§ 1651. After adverting to the fact that there is nothing in the Constitution to prevent Congress giving to inferior courts original jurisdiction in cases to which the appellate power of the Supreme Court may extend, he proceeds: "We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends. We ask, then, if it can be sufficient to exclude this jurisdiction that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of

¹ *Osborn v. Bank of the United States*, 9 Wheat. R. 819, 820.

these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say it never can be extended to the whole case; because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal; and thus it will be restricted to a single question in that cause. And words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal into which he is forced against his will. We think, then, that when a question, to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

§ 1652. "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire

no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law? Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right; and if it was constitutional, then, it cannot cease to be so because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not. The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other

questions may also arise, as to the execution of the contract or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

§ 1653. "The clause giving the bank a right to sue in the circuit courts of the United States stands on the same principle with the acts authorizing officers of the United States, who sue in their own names, to sue in the courts of the United States. The postmaster-general, for example, cannot sue under that part of the Constitution which gives jurisdiction to the federal courts, in consequence of the character of the party, nor is he authorized to sue by the judiciary act. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said, that it is such a case because a law of the United States authorizes the contract and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

§ 1654. "If it be said, that a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the postmaster-general. The plea in bar may be payment, if the suit be brought on a bond, or non-assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the postmaster-general to sue in the courts of the United States, has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the Constitution which asserts the right of the legislature to give original jurisdiction to the circuit courts in cases arising under a law of the United States. The clause in the patent law authorizing suits in the circuit courts stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact

that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position that the case does not arise under a law of the United States.

§ 1655. "It is said, that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank. This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is attested by it. To use the language of the Constitution, every act of the bank arises out of this law. A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual. The Constitution then takes him up, and among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction. The law makes none. There is, then, no resemblance between the act incorporating the bank and the general naturalization law. Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation, enabling the bank to sue in the courts of the United States, is consistent with the Constitution, and to be obeyed in all the courts."¹

¹ *Osborn v. Bank of the United States*, 9 Wheat. R. 821 to 828. See also *Bank of the United States v. Georgia*, 9 Wheat. R. 904.

§ 1656. Cases may also arise under laws of the United States by implication, as well as by express enactment, so that due redress may be administered by the judicial power of the United States. It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.¹

§ 1657. It has also been asked, and may again be asked, why the words "cases in equity" are found in this clause? What equitable causes can grow out of the Constitution, laws, and treaties of the United States? To this the general answer of the Federalist²(a) seems at once clear and satisfactory. "There is hardly a subject of litigation between individuals which may not involve those ingredients of *fraud, accident, trust, or hardship* which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate.

¹ Osborn v. Bank of the United States, 9 Wheat. R. 865, 866; Id. 847, 848.

² The Federalist, No. 80. See also 1 Tuck. Black. Comm. App. 418, 419; 2 Elliot's Debates, 389, 390.

(a) Robinson v. Campbell, 3 Wheat. r. Creighton, 24 How. 159; Noonan v. 212; Neves v. Scott, 13 How. 268; Fitch Lee, 2 Black, 499.

In such cases where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice, without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between LAW and EQUITY is not maintained, as in this State, where it is exemplified by every day's practice."

§ 1658. The next clause extends the judicial power "to all cases affecting ambassadors, other public ministers, and consuls." The propriety of this delegation of power to the national judiciary will scarcely be questioned by any persons who have duly reflected upon the subject. There are various grades of public ministers, from ambassadors (which is the highest grade) down to common resident ministers, whose rank and diplomatic precedence and authority are well known and well ascertained in the law and usages of nations.¹ But whatever may be their relative rank and grade, public ministers of every class are the immediate representatives of their sovereigns. As such representatives, they owe no subjection to any laws but those of their own country, any more than their sovereign; and their actions are not generally deemed subject to the control of the private law of that State wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made. But public ministers ought, in order to perform their duties to their own sovereign, to be independent of every power except that by which they are sent; and, of consequence, ought not to be subject to the mere municipal law of that nation wherein they are to exercise their functions.² The rights, the powers, the duties, and the privileges of

¹ Three classes are usually distinguished in diplomacy: 1. Ambassadors, who are the highest order, who are considered as personally representing their sovereigns; 2. Envoys extraordinary and ministers plenipotentiary; 3. Ministers resident and ministers *chargés d'affaires*. Mere common *chargés d'affaires* are deemed of still lower rank. Dr. Lieber's *Encyclopedia Americana*, art. *Ministers, Foreign*; Vattel, B. 4, ch. 6, §§ 71 to 74.

² 1 Black. Comm. 253; Vattel, B. 4, ch. 7, §§ 80, 81, 92, 99, 101; 1 Kent's Comm. Lect. 2, pp. 37, 38 (2d edit. pp. 38, 39). In the case of the *Schooner Exchange v. M'Faddon* (7 Cranch, 116, 138), the Supreme Court state the grounds of the immunity of foreign ministers in a very clear manner, leaving the important question whether that immunity can be forfeited by misconduct open to future decision. "A second

public ministers are, therefore, to be determined, not by any municipal constitutions, but by the law of nature and nations, which is equally obligatory upon all sovereigns and all states.¹ What these rights, powers, duties, and privileges are, are inquiries properly belonging to a treatise on the laws of nations, and need not be discussed here.² But it is obvious that every question in which these rights, powers, duties, and privileges are involved is so intimately connected with the public peace, and policy, and diplomacy of the nation, and touches the dignity and interest of the sovereigns of the ministers concerned so

case," says Mr. Chief Justice Marshall, in delivering the opinion of the court, "standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers. Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

"This consent is not expressed. It is true, that in some countries, and in this, among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

"In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received, as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them." See also 1 Black. Comm. 254, and Christian's note (4); Vattel, B. 4, ch. 7, §§ 92, 99, 101; Id. ch. 8, §§ 113, 114, 115, 116; Id. ch. 9, §§ 117, 119, 120, 121, 122, 123, 124; 1 Kent's Comm. Lect. 2.

¹ *Ex parte Cabrera*, 1 Wash. Cir. R. 232.

² Vattel discusses the subject of the rights, privileges, and immunities of foreign ambassadors very much at large, in B. 4, ch. 7, of his Treatise on the Law of Nations.

deeply, that it would be unsafe that they should be submitted to any other than the highest judicature of the nation.

§ 1659. It is most fit that this judicature should, in the first instance, have original jurisdiction of such cases,¹ so that, if it should not be exclusive, it might at least be directly resorted to when the delays of a procrastinated controversy in inferior tribunals might endanger the repose or the interests of the government.² It is well known that an arrest of the Russian ambassador in a civil suit in England, in the reign of Queen Anne, was well-nigh bringing the two countries into open hostilities; and was atoned for only by measures which have been deemed, by her own writers, humiliating. On that occasion an act of Parliament was passed, which made it highly penal to arrest any ambassador, or his domestic servants, or to seize or distrain his goods; and this act, elegantly engrossed and illuminated, accompanied by a letter from the Queen, was sent by an ambassador extraordinary to propitiate the offended Czar.³ And a statute to the like effects exists in the criminal code established by the first Congress under the Constitution of the United States.⁴

§ 1660. Consuls, indeed, have not in strictness a diplomatic character. They are deemed as mere commercial agents, and therefore partake of the ordinary character of such agents, and are subject to the municipal laws of the countries where they reside.⁵ Yet, as they are the public agents of the nation to which they belong, and are often intrusted with the performance of very delicate functions of state, and as they might be greatly embarrassed by being subject to the ordinary jurisdiction of inferior tribunals, state and national, it was thought highly expedient to extend the original jurisdiction of the Supreme Court to them also.⁶ The propriety of vesting jurisdiction in such cases in

¹ The Federalist, No. 80. See also 2 Elliot's Debates, 390, 400; The Federalist, No. 80; *Marbury v. Madison*, 1 Cranch, R. 137, 174, 175.

² 1 Tuck. Black. Comm. App. 361; *Ex parte Cabrera*, 1 Wash. Cir. R. 232.

³ 1 Black. Comm. 255, 256; 4 Id. 70.

⁴ Act of 1790, ch. 36, §§ 26, 27; 1 Kent's Comm. Lect. 9, pp. 170, 171 (2d edition, pp. 182, 183).

⁵ See Vattel, B. 2, ch. 2, § 34; Id. B. 4, ch. 6, § 75; Wicquefort, B. 1, § 5; 1 Kent's Comm. Lect. 2, pp. 40, 43 (2d edition, pp. 41 to 44); 2 Brown's Adm. Law, ch. 14, p. 503; *Viveash v. Becker*, 3 Maule & Sel. R. 284; Rawle on Const. ch. 24, pp. 224 to 226.

⁶ The Federalist, No. 80; *Cohens v. Virginia*, 6 Wheat. R. 396; 1 Kent's Comm. Lect. 2, p. 44 (2d edition, p. 45); Rawle on Const. ch. 24, pp. 224 to 226.

some of the national courts seems hardly to have been questioned by the most zealous opponents of the Constitution.¹ And in cases *against* ambassadors, and other foreign ministers and consuls, the jurisdiction has been deemed exclusive.²

§ 1661. It has been made a question whether this clause, extending jurisdiction to all cases *affecting* ambassadors, ministers, and consuls, includes cases of indictments found against persons for offering violence to them, contrary to the statute of the United States punishing such offence. And it has been held that it does not. Such indictments are mere public prosecutions, to which the United States and the offender only are parties; and which are conducted by the United States for the purpose of vindicating their own laws and the law of nations. They are strictly, therefore, cases affecting the United States; and the minister himself who has been injured by the offence has no concern in the event of the prosecution or the costs attending it.³ Indeed, it seems difficult to conceive how there can be a case affecting an ambassador, in the sense of the Constitution, unless he is a party to the suit on record, or is directly affected and bound by the judgment.⁴

¹ 2 Elliot's Debates, 383, 384, 418; 8 Id. 281; 1 Tuck. Black. Comm. App. 183. Under the confederation no power existed in the national government to punish any person for the violation of the rights of ambassadors and other foreign ministers and consuls. Congress, in November, 1781, recommended to the legislatures of the States to pass laws punishing infractions of the law of nations, committed by violating safe-conducts or passports granted by Congress; by acts of hostility against persons in amity with the United States; by infractions of the immunities of ambassadors; by infractions of treaties or conventions; and to erect a tribunal, or to vest one already existing, with power to decide on offences against the law of nations; and to authorize suits for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen. This, like other recommendations, was silently disregarded, or openly refused. See Journ. of Congress, 23d of Nov. 1781, p. 234. Sergeant on Const. Introduction, p. 16 (2d edition).

² Rawle on Constitution, ch. 21, p. 203; Id. ch. 24, pp. 222, 223; 1 Kent's Comm. Lect. 2, p. 44 (2d edition, p. 45); Id. Lect. 15, pp. 294, 295 (2d editi. n, pp. 314, 315); Commonwealth v. Kosloff, 5 Serg. & Rawle, 545; Hall v. Young, 3 Pick. R. 80; United States v. Ortega, 11 Wheat. R. 467, and Mr. Wheaton's note, Id. 469 to 475; Manhardt v. Soderstrom, 1 Binn. R. 138; United States v. Ravara, 2 Dall. R. 297; Cohens v. Virginia, 6 Wheat. R. 396, 397; Osborn v. Bank of United States, 9 Wheat. R. 820, 821; Chisholm v. Georgia, 2 Dall. R. 431, per Iredell, J.; Davis v. Packard, 7 Peters's S. C. R. 276.

³ United States v. Ortega, 11 Wheat. R. 467. See also Osborn v. Bank of United States, 9 Wheat. R. 854, 855.

⁴ Ibid.

§ 1662. The language of the Constitution is, perhaps, broad enough to cover cases where he is not a party, but may yet be affected in interest. This peculiarity in the language has been taken notice of in a recent case by the Supreme Court.¹ "If a suit be brought against a foreign minister," said Mr. Chief Justice Marshall, in delivering the opinion of the court, "the Supreme Court alone has original jurisdiction; and this is shown on the record. But suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary or his servant, become a party to this suit; but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed; not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties."

§ 1663. The next clause extends the judicial power "to all cases of admiralty and maritime jurisdiction."² (a)

§ 1664. The propriety of this delegation of power seems to have been little questioned at the time of adopting the Constitution. "The most bigoted idolizers of State authority," said the Federalist,³ "have not, thus far, shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect

¹ *United States v. Ortega*, 11 Wheat. R. 467. See also *Osborn v. Bank of United States*, 9 Wheat. R. 854, 855.

² See Mr. Marshall's Speech, 5 Wheat. R. 16, Appx; *Id.* 27.

³ The Federalist, No. 80. See also 2 Elliot's Debates, 383, 384, 390, 418, 419.

(a) See *The Lottawanna*, 21 Wall 558.

the rights of foreigners, that they fall within the considerations which are relative to the public peace." The subject is dismissed with an equally brief notice by Mr. Chief Justice Jay, in the case of *Chisholm v. Georgia*, in the passage already cited.¹ It demands, however, a more enlarged examination, which will clearly demonstrate its utility and importance as a part of the national power.

§ 1665. It has been remarked by the Federalist, in another place, that the jurisdiction of the court of admiralty, as well as of other courts, is a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which it is circumscribed.² This remark is equally true in respect to England and America; to the high court of admiralty sitting in the parent country, and to the vice-admiralty courts sitting in the colonies. At different periods the jurisdiction has been exercised to a very different extent; and in the colonial courts it seems to have had boundaries different from those prescribed to it in England. It has been exercised to a larger extent in Ireland than in England; and, down to this very day, it has a most comprehensive reach in Scotland.³ The jurisdiction claimed by the courts of admiralty, as properly belonging to them, extends to all acts and torts done upon the high seas, and within the ebb and flow of the sea, and to all maritime contracts, that is, to all contracts touching trade, navigation, or business upon the sea, or the waters of the sea, within the ebb and flow of the tide. Some part of this jurisdiction has been matter of heated controversy between the courts of common law and the high court of admiralty in England, with alternate success and defeat. But much of it has been gradually yielded to the latter, in consideration of its public convenience, if not of its paramount necessity. It is not our design to go into a consideration of these vexed questions, or to attempt any general outline of the disputed boundaries. It will be sufficient in this place to present a brief view of that which is admitted and is indisputable.⁴ (a)

¹ 2 Dall. R. 475; *ante*, § 1639.

² The Federalist, No. 37. See 1 Kent's Comm. Lect. 17.

³ See *De Lovio v. Boit*, 2 Gallison's R. 398; 1 Kent's Comm. Lect. 17, *passim*.

⁴ Upon this subject the learned reader is referred to Sergeant on Const. Law, ch. 21,

(a) Upon no subject have the rulings of the federal courts been so wanting in uniformity as upon the jurisdiction here considered. It would not be profitable

§ 1666. The admiralty and maritime jurisdiction (and the word "maritime" was, doubtless, added to guard against any narrow interpretation of the preceding word, "admiralty") conferred by the Constitution embraces two great classes of cases, — one dependent upon locality, and the other upon the nature of the contract. The first respects acts or injuries done upon the high sea, where all nations claim a common right and common jurisdiction;¹ or acts or injuries done upon the coast of the sea; or, at furthest, acts and injuries done within the ebb and flow of the tide. (a) The second respects contracts, claims, and services

and the authorities there cited; to Gordon's Digest, art. 763 to 792; to 1 Kent's Comm. Lect. 17, *passim*; 2 Brown's Adm. Law, ch. 4, 6, 12. Mr. Sergeant (in his introduction to the second edition of his very valuable work on Constitutional Law, pp. 3, 4, and note) seems to suppose that the admiralty commission of the governor of New Hampshire, referred to in *De Lovio v. Boit*, 2 Gallison's R. 470, 471, might be an extension of the ordinary commissions of the colonial admiralty judges. It is believed that he is mistaken in this supposition. In Stokes's History of the Colonies there is a commission similar in its main clauses; and Mr. Stokes says that it was the usual form of the commissions. Stokes's Hist. of Colon. ch. 4, p. 166. See also Mr. Wheaton's notes to the case of the *United States v. Bevens*, 3 Wheat. R. 336, 357, 361, 365.

¹ See Mr. Marshall's Speech, 5 Wheat. R. Appx. 16.

to review those rulings in this place, but the following cases may be referred to as giving a history of the jurisdiction, and the rules by which it is to be tested: *De Lovio v. Boit*, 2 Gall. 437; *The Volunteer*, 1 Sum. 551; *Bains v. The James & Catherine*, Baldw. 544; *Waring v. Clark*, 5 How. 441; *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344; *The Genesee Chief*, 12 How. 443; *The St. Lawrence*, 1 Black, 527; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624; *Insurance Co. v. Dunham*, 11 Wall. 1.

The grant in the Constitution, it is held, is not to be limited to, or interpreted by, what were cases of admiralty jurisdiction in England when the Constitution was adopted, but extends the power so as to cover every expansion of such jurisdiction. *Waring v. Clarke*, 5 How. 458.

A State cannot, by its statutes, confer jurisdiction upon the federal courts, but

it may give a right which, if of the proper nature, may be enforced therein; *e. g.* the right to compensation for pilotage. *Ex parte M'Niel*, 13 Wall. 236.

(a) It was decided in *The Genesee Chief*, 12 How. 443, overruling earlier cases, that the admiralty and maritime jurisdiction conferred by the Constitution is not limited to the high seas, or to tide waters, or even to waters navigable from the ocean, but extends also to the great lakes lying along the northern borders of our country, and to the waters connecting the same. See also *The Eagle*, 8 Wall. 15. In *Fritz v. Bull*, 12 How. 466, this doctrine was applied to the Mississippi above tide-water, and in *The Magnolia*, 20 How. 296, to the Alabama, a river whose navigable course is wholly within the limits of a single State. See also *Nelson v. Leland*, 22 How. 43; *The Commerce*, 1 Black, 574.

But it does not extend to canal navigation within a State, even though a

purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches, one embracing captures, and questions of prize arising *jure belli*; the other embracing acts, torts, and injuries strictly of civil cognizance,—independent of belligerent operations.¹

§ 1667. By the law of nations, the cognizance of all captures, *jure belli*, or, as it is more familiarly phrased, of all questions of prize and their incidents, belongs exclusively to the courts of the country to which the captors belong, and from whom they derive their authority to make the capture. No neutral nation has any right to inquire into or to decide upon the validity of such capture, even though it should concern property belonging to its own citizens or subjects, unless its own sovereign or territorial rights are violated; but the sole and exclusive jurisdiction belongs to the courts of the capturing belligerent. And this jurisdiction, by the common consent of nations, is vested exclusively in courts of admiralty possessing an original or appellate jurisdiction. The courts of common law are bound to abstain from any decision of questions of this sort, whether they arise directly or indirectly in judgment. The remedy for illegal acts of capture is by the institution of proper prize proceedings in the prize courts of the captors.² (a) If justice be there denied, the nation itself becomes responsible to the parties aggrieved; and, if every remedy is refused, it then becomes a subject for the consideration of the nation to which the parties aggrieved belong, which may vindicate

¹ See *Martin v. Hunter*, 1 Wheat. R. 335.

² *Le Caux v. Eden*, Doug. R. 594; *Lindo v. Rodney*, Doug. R. 613, note; *L'Invincible*, 1 Wheat. R. 238; *The Estrella*, 4 Wheat. R. 298; *Bingham v. Cabot*, 3 Dall. 19; *La Amistad de Rues*, 5 Wheat. R. 385; 1 Kent's Comm. Lect. 17, p. 334 (2d edition, p. 356).

portion of the voyage is through public navigable waters. *McCormick v. Ives*, Abb. Adm. 418.

In *The Commerce*, *supra*, and *The Bel-fast*, 7 Wall. 624, it was declared, overruling previous cases, that the admiralty and maritime jurisdiction of the federal courts was not confined within the limits of the power of Congress over commerce, but would embrace the case of a collision on navigable waters of vessels engaged in

commerce between ports of the same State (1 Black, 574), and the case of a contract of affreightment to be performed entirely within a State. 7 Wall. 624.

A maritime lien cannot attach to fixed and immovable things, like a bridge. *The Rock Island Bridge*, 6 Wall. 213.

(a) See, as to jurisdiction in prize cases upon rivers, case of 680 Pieces of Merchandise, 2 Sprague, 233; *U. S. v. 269½ Bales Cotton*, 1 Woolw. 236.

their rights, either by a peaceful appeal to negotiation or a resort to arms.

§ 1668. It is obvious, upon the slightest consideration, that cognizance of all questions of prize, made under the authority of the United States, ought to belong exclusively to the national courts. How, otherwise, can the legality of the captures be satisfactorily ascertained, or deliberately vindicated? It seems not only a natural but a necessary appendage to the power of war and negotiation with foreign nations. It would otherwise follow, that the peace of the whole nation might be put at hazard at any time by the misconduct of one of its members. It could neither restore upon an illegal capture, nor in many cases afford any adequate redress for the wrong, nor punish the aggressor. It would be powerless and palsied. It could not perform, or compel the performance of, the duties required by the law of nations. It would be a sovereign without any solid attribute of sovereignty; and move *in vinculis* only to betray its imbecility. Even under the confederation, the power to decide upon questions of capture and prize was exclusively conferred in the last resort upon the national court of appeals.¹ But, like all other powers conferred by that instrument, it was totally disregarded wherever it interfered with State policy, or with extensive popular interests. We have seen that the sentences of the national prize court of appeals were treated as mere nullities, and were incapable of being enforced until after the establishment of the present Constitution.² The same reasoning which conducts us to the conclusion that the national courts ought to have jurisdiction of this class of admiralty cases, conducts us equally to the conclusion that to be effectual for the administration of international justice it ought to be exclusive. And, accordingly, it has been constantly held that this jurisdiction is exclusive in the courts of the United States.³

§ 1669. The other branch of admiralty jurisdiction, dependent upon locality, respects civil acts, torts, and injuries done on the sea, or (in certain cases) on waters of the sea, where the tide ebbs and flows, without any claim of exercising the rights of war.

¹ Confederation, Art. 9.

² See *Penhallow v. Doane*, 3 Dall. R. 52; *Jennings v. Carson*, 4 Cranch, 2; *ante*, vol. i.

³ See *Martin v. Hunter*, 1 Wheat. R. 335, 337; *United States v. Bevans*, 3 Wheat. R. 387; *Houston v. Moore*, 5 Wheat. R. 49; *Ogden v. Saunders*, 12 Wheat. R. 278; 1 Kent's Comm. Lect. 17, pp. 330 to 337 (2d edition, pp. 353 to 360).

Such are cases of assaults and other personal injuries; cases of collision, or running of ships against each other; cases of spoliation and damage (as they are technically called), such as illegal seizures, or depredations upon property; cases of illegal dispossession, or withholding possession from the owners of ships, commonly called possessory suits; cases of seizures under municipal authority for supposed breaches of revenue, or other prohibitory laws; and cases of salvage for meritorious services performed in saving property, whether derelict, or wrecked, or captured, or otherwise in imminent hazard from extraordinary perils.¹

§ 1670. It is obvious that this class of cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states, and raise many questions of international law, not merely touching private claims, but national sovereignty and national reciprocity. Thus, for instance, if a collision should take place at sea between an American and foreign ship, many important questions of public law might be connected with its just decision; for it is obvious that it could not be governed by the mere municipal law of either country. So, if a case of recapture or other salvage service performed to a foreign ship should occur, it must be decided by the general principles of maritime law, and the doctrines of national reciprocity. Where a recapture is made of a friendly ship from the hands of its enemy, the general doctrine now established is to restore it upon salvage, if the foreign country to which it belongs adopts a reciprocal rule; or to condemn it to the recaptors, if the like rule is adopted in the foreign country. And in other cases of salvage, the doctrines of international and maritime law come into full activity, rather than those of any mere municipal code.² (a)

¹ See *La Vengeance*, 3 Dall. R. 297; *Martin v. Hunter*, 1 Wheat. R. 335, 337; *The Sarah*, 8 Wheat. R. 391, 394; *M'Donough v. Dannery*, 3 Dall. R. 182; *The Blaireau*, 2 Cranch, 249; *The Amiable Nancy*, 3 Wheat. R. 546; *The General Smith*, 4 Wheat. R. 438; *Rose v. Himely*, 4 Cranch, 241; *Manro v. Almeida*, 10 Wheat. R. 473; *The Apollon*, 9 Wheat. R. 362; *The Marianna Flora*, 11 Wheat. R. 1, 42; *The Fabius*, 2 Rob. R. 245; *The Thames*, 5 Rob. R. 345; *The St. Juan Baptista*, 5 Rob. R. 33, 40, 41; *Abbott on Shipping*, P. 2, ch. 4, note to American edition, 1829, pp. 132, 138; *The Dundee*, 1 Hagg. Adm. R. 109; *The Ruckers*, 4 Rob. R. 73; 1 Kent's Comm. Lect. 17, pp. 342 to 352 (2d edition, pp. 365 to 377); *The Agincourt*, 1 Hagg. R. 271.

² *The Santa Cruz*, 1 Rob. R. 50; *The San Francisco*, 1 Edw. R. 179; *The Adeline*,

(a) See *Houseman v. The North Carolina*, 15 Pet. 40.

There is, therefore, a peculiar fitness in appropriating this class of cases to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication; and thus to become more satisfactory to foreigners.

§ 1671. The remaining class respects contracts, claims, and services purely maritime. Among these are the claims of material-men and others for repairs and outfits of ships belonging to foreign nations or to other States,¹ bottomry bonds for moneys lent to ships in foreign ports to relieve their distresses, and enable them to complete their voyages;² surveys of vessels damaged by perils of the seas;³ pilotage on the high seas;⁴ and suits for mariners' wages.⁵ These, indeed, often arise in the course of the commerce and navigation of the United States; and seem emphatically to belong as incidents to the power to regulate commerce. But they may also affect the commerce and navigation of foreign nations. Repairs may be done and supplies furnished to foreign ships; money may be lent on foreign bottoms; pilotage and mariners' wages may become due in voyages in foreign employment; and in such cases the general maritime law enables the courts of admiralty to administer a wholesome and prompt justice.⁶ Indeed, in many of these cases, as the courts of admiralty entertain suits *in rem* as well as *in personam*, they are often the only courts in which an effectual redress can be afforded, especially when it is desirable to enforce a specific maritime lien.⁷

9 Cranch, 244; 2 Wheat. R. App. 40 to 45; Abbott on Shipping (Amer. edit. 1829), P. 3, ch. 10, pp. 397, 417, 422.

¹ The St. Jago de Cuba, 9 Wheat. R. 409, 416; The Aurora, 1 Wheat. R. 105.

² The Aurora, 1 Wheat. R. 96.

³ Janney v. Columbia Insurance Company, 10 Wheat. R. 412, 415, 418. Among my manuscripts is the copy of a decree of condemnation of a vessel at Boston by the vice-admiralty; there are petitions of master and a survey, that she was unfit to repair. The decree was made in 1745 by Judge Auchmuty.

⁴ The Anne, 1 Mason's R. 508.

⁵ The Thomas Jefferson, 10 Wheat. R. 428.

⁶ The Two Friends, 1 Rob. R. 271; The Helena, 4 Rob. R. 3; The Jacob, 4 Rob. R. 245; The Gratitude, 3 Rob. R. 240; The Favourite, 2 Rob. R. 232; Abbott on Shipping, P. 2, ch. 3, p. 115, Story's note; Id. P. 4, ch. 4; The Aurora, 1 Wheat. R. 96.

⁷ Manro v. Almeida, 10 Wheat. R. 473; The Merino, 9 Wheat. R. 391, 416, 417; The General Smith, 4 Wheat. R. 438; The Thomas Jefferson, 10 Wheat. R. 428; Shepherd v. Taylor, 5 Peters's Sup. C. R. 675; 1 Kent's Comm. Lect. 17, pp. 352 to 354 (2d edition, pp. 378 to 381); 2 Brown's Adm. Law. ch. 71.

§ 1672. So that we see the admiralty jurisdiction naturally connects itself on the one hand with our diplomatic relations and duties to foreign nations and their subjects, and on the other hand with the great interests of navigation and commerce, foreign and domestic.¹ There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort, which cannot be wielded except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home. It may be added, that in many of the cases included in these latter classes the same reasons do not exist as in cases of prize for an exclusive jurisdiction; and therefore, whenever the common law is competent to give a remedy in the State courts, they may retain their accustomed concurrent jurisdiction in the administration of it.²

¹ "The admiralty jurisdiction," said the Supreme Court in a celebrated case, "embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested. It embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty." *Martin v. Hunter*, 1 Wheat. R. 335.

² Mr. Chancellor Kent and Mr. Rawle seem to think (1 Kent's Comm. Lect. 17, p. 351 (2d edit., p. 377); Rawle on Const. ch. 21, p. 202. See also 1 Tuck. Black. Comm. App. 181, 182; 2 Elliot's Deb. 390; 10 Wheat. R. 418) that the admiralty jurisdiction given by the Constitution is in all cases necessarily exclusive. But it is believed that this opinion is founded in a mistake. It is exclusive in all matters of prize, for the reason that at the common law this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of the courts of common law and the admiralty is concurrent (as in cases of possessory suits, mariners' wages, and marine torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is as little ground upon general reason to contend for it. The reasonable interpretation of the Constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature, and extent, and modifications in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty, as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction. The Judiciary Act of 1789, ch. 20, § 9, has manifestly proceeded upon this supposition; for while it has conferred on the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," it has at the same time saved "to the

§ 1673. We have been thus far considering the admiralty and maritime jurisdiction in civil cases only. But it also embraces all public offences committed on the high seas, and in creeks, havens, basins, and bays within the ebb and flow of the tide, at least in such as are out of the body of any county of a State. In these places the jurisdiction of the courts of admiralty over offences is exclusive; for that of the courts of common law is limited to such offences as are committed within the body of some county. And on the sea-coast there is an alternate or divided jurisdiction of the courts of common law and admiralty, in places between high and low water mark, the former having jurisdiction when and as far as the tide is out, and the latter when and as far as the tide is in, *usque ad filum aquæ*, or to high-water mark.^{1(c)} This criminal jurisdiction of the admiralty is therefore exclusively vested in the national government, and may be exercised over such crimes and offences as Congress may from time to time delegate to the cognizance of the national courts.^{2(d)} The propriety of vesting this criminal jurisdiction

suitors in all cases the right of a common-law remedy, where the common law is competent to give it." We shall, hereafter, have occasion to consider more at large in what cases there is a concurrent jurisdiction in the national and State courts. Mr. Chancellor Kent, in his third edition of his Commentaries, more than intimates that there is a discrepancy between the doctrine here stated and that stated in *Martin v. Hunter*, in 1 Wheat. R. 333 to 337. I am not prepared to admit this. (a) In p. 337, the very concurrency of jurisdiction in the State courts in some cases is asserted. See *post*, §§ 1751, 1752, 1753, 1754. (b)

¹ *Constable's Case*, 5 Co. R. 106; 2 Instit. 51; 1 Black. Comm. 110; Hale in Harg. Law Tracts, P. 1, ch. 3; Id. ch. 4, pp. 10, 12; P. 2, ch. 7, p. 88; 2 Hale, P. C. p. 13, &c.; 64 Comm. Dig. *Navigation*, A. & B.; Id. *Admiralty*, E. J.; *United States v. Grush*, 5 Mason's R. 290; 1 Kent's Comm. Lect. 17, pp. 337 to 342 [2d edition, pp. 360 to 365]; *United States v. Bevans*, 3 Wheat. R. 336; Id. 357; Mr. Wheaton's notes, 357, 361, 365, 366, 368, 369; *Beeve's Case*, 2 Leach, Cir. Cas. 1093 [4th edition]; *Ryan & Russ. Cas.* 243; 4 Tuck. Black. Comm. App. 7.

² *United States v. Bevans*, 3 Wheat. R. 356, 386 to 389; 4 Elliot's Deb. 290, 291;

(a) See *The Nassua*, 4 Wall. 634; *The Siren*, 7 Wall. 152.

(b) It is now held that the admiralty jurisdiction of the federal courts is exclusive, in all cases of maritime torts, and contracts, and liens for maritime services. But suits *in personam* in the same cases, whether authorized by the principles of the common law or by State statutes, are cognizable in the State courts. *The Moses Taylor*, 4 Wall. 411; *The Hine v.*

Trevor, Id. 556; *The Belfast*, 7 Wall. 624; *Leon v. Galceran*, 11 Wall. 185.

(c) See *United States v. Coombs*, 12 Peters, 72; *Waring v. Clarke*, 5 Howard, 464, where this doctrine is precisely enunciated.

(d) To the exercise of this jurisdiction by the federal courts, legislation by Congress is essential. *United States v. Wilson*, 3 Blatch. 435.

in the national government depends upon the same reasoning, and is established by the same general considerations, as have been already suggested in regard to civil cases. It is essentially connected with the due regulation and protection of our commerce and navigation on the high seas, and with our rights and duties in regard to foreign nations and their subjects in the exercise of common sovereignty on the ocean. The States, as such, are not known in our intercourse with foreign nations, and not recognized as common sovereigns on the ocean. And if they were permitted to exercise criminal or civil jurisdiction thereon, there would be endless embarrassments arising from the conflict of their laws, and the most serious dangers of perpetual controversies with foreign nations. In short, the peace of the Union would be constantly put at hazard by acts over which it had no control, and by assertions of right which it might wholly disclaim.¹

§ 1674. The next clause extends the judicial power "to controversies to which the United States shall be a party."² It scarcely

1 Kent's Comm. Lect. 16, pp. 319, 320 (2d edit. pp. 339, 340); Lect. 17, p. 337 (2d edit. p. 360).

¹ It has been made a question whether the admiralty jurisdiction can be exercised within the territories of the United States by the judges of the territorial courts, appointed under the territorial governments, as they are appointed for a limited term only, and not during good behavior. The decision has been in favor of the jurisdiction, upon the ground (already suggested) that Congress have the exclusive power to regulate such territories as they may choose; and they may confer on the territorial government such legislative powers as they may choose. The courts appointed in such territories are not constitutional courts in which judicial powers conferred by Constitution on the general government can be deposited. They are merely legislative courts, and the jurisdiction with which they are invested is not a part of the judicial power defined in the third article of the Constitution. *The American Insurance Company v. Canter*, 1 Peters's Supp. R. 511.

² Mr. Tucker distinguishes between the word "cases" used in the preceding clauses and the word "controversies" here used. The former he deems to include all suits, criminal as well as civil; the latter as including such only as are of a civil nature. As here applied, controversies "seem," says he, "particularly appropriated to such disputes as might arise between the United States and any one or more States respecting territorial or fiscal matters, or between the United States and their debtors, contractors, and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a civil nature only, such, for example, as may arise between two or more States, or between citizens of different States, or between a State and the citizens of another State," &c. 1 Tuck. Black. Comm. App. 420, 421. Mr. Justice Iredell, in his opinion in *Chisholm v. Georgia*, 2 Dall. R. 419, 431, 432, gives the same construction to the word "controversies," confining it to such as are of a civil nature.

In the original draft of the Constitution, this clause, "controversies to which the

seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party.¹ It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals. And there would not only not be any compulsory power over those courts to perform such functions, but there would not be any means of producing uniformity in their decisions. A sovereign without the means of enforcing civil rights, or compelling the performance, either civilly or criminally, of public duties on the part of the citizens, would be a most extraordinary anomaly. It would prostrate the Union at the feet of the States. It would compel the national government to become a suppliant for justice before the judicature of those who were by other parts of the Constitution placed in subordination to it.²

§ 1675. It is observable that the language used does not confer upon any court cognizance of all controversies to which the United States shall be a party, so as to justify a suit to be brought against the United States without the consent of Congress. And the language was doubtless thus guardedly introduced for the purpose of avoiding any such conclusion. It is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amenable to the suit of any private person without its own consent.³ (a) This exemption is "United States shall be a party," was omitted. It was added afterwards without any apparent objection. *Journal of Convention*, 226, 297, 298.

¹ *The Federalist*, No. 80 ; 3 *Elliot's Debates*, 280, 281. See also 2 *Elliot's Deb.* 380, 383, 384, 389, 390, 400, 404.

² Mr. Sergeant, in his *Introduction to his work on Constitutional Law*, has abundantly shown the mischief of such a want of power under the confederation. See *Serg. Const. Law. Introd.* pp. 15 to 18.

³ *The Federalist*, No. 81. See *Chisholm v. Georgia*, 2 *Dall. R.* 419, 478 ; 1 *Black. Comm.* 241 to 243 ; *Cohens v. Virginia*, 6 *Wheat. R.* 380 ; *Id.* 411, 412.

(a) See *United States v. Lee*, 106 *U.S.* 196 ; *The Davis*, 10 *Wall.* 15 ; *The Siren*, 7 *Wall.* 152 ; *Nations v. Johnson*, 24 *How.* 195 ; *Hill v. United States*, 9 *How.* 386 ; *United States v. McLemore*, 4 *How.* 286 ;

United States v. Clarke, 8 *Peters*, 436. The establishment of the Court of Claims, for the express purpose of passing upon claims against the government, may be noticed. 10 *Stat. at Large*, 612.

an attribute of sovereignty belonging to every State in the Union, and was designedly retained by the national government.¹ The inconvenience of subjecting the government to perpetual suits, as a matter of right, at the will of any citizen, for any real or supposed claim or grievance, was deemed far greater than any positive injury that could be sustained by any citizen by the delay or refusal of justice. Indeed, it was presumed that it never would be the interest or inclination of a wise government to withhold justice from any citizen. And the difficulties of guarding itself against fraudulent claims and embarrassing and stale controversies were believed far to outweigh any mere theoretical advantages to be derived from any attempt to provide a system for the administration of universal justice.

§ 1676. It may be asked, then, whether the citizens of the United States are wholly destitute of remedy, in case the national government should invade their rights, either by private injustice and injuries, or by public oppression? To this it may be answered, that in a general sense there is a remedy in both cases. In regard to public oppressions, the whole structure of the government is so organized as to afford the means of redress, by enabling the people to remove public functionaries who abuse their trust, and to substitute others more faithful and more honest in their stead. If the oppression be in the exercise of powers clearly constitutional, and the people refuse to interfere in this manner, then, indeed, the party must submit to the wrong, as beyond the reach of all human power; for how can the people themselves, in their collective capacity, be compelled to do justice and to vindicate the rights of those who are subjected to their sovereign control?² If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.

§ 1677. As to private injustice and injuries, they may regard either the rights of property or the rights of contract, for the national government is *per se* incapable of any merely personal

¹ Mr. Locke strenuously contends for this exemption of the sovereign from judicial amenability; and in this, he does but follow out the doctrines of Puffendorf and other writers on the law of nations. See Locke on Government, P. 2, § 205; Puffendorf's Law of Nature and Nations, B. 8, ch. 10; Vattel, B. 1, ch. 4, §§ 49, 50.

² See on this subject, 1 Black. Comm. 243, 245.

wrong, such as an assault and battery, or other personal violence. In regard to property, the remedy for injuries lies against the immediate perpetrators, who may be sued, and cannot shelter themselves under any imagined immunity of the government from due responsibility.¹ If, therefore, any agent of the government shall unjustly invade the property of a citizen under color of a public authority, he must, like every other violator of the laws, respond in damages. Cases, indeed, may occur in which he may not always have an adequate redress without some legislation by Congress; as, for example, in places ceded to the United States, and over which they have an exclusive jurisdiction, if his real estate is taken without or against lawful authority. Here he must rely on the justice of Congress, or of the executive department. The greatest difficulty arises in regard to the contracts of the national government; for, as they cannot be sued without their own consent, and as their agents are not responsible upon any such contracts when lawfully made, the only redress which can be obtained must be by the instrumentality of Congress, either in providing (as they may) for suits in the common courts of justice to establish such claims by a general law, or by a special act for the relief of the particular party. In each case, however, the redress depends solely upon the legislative department, and cannot be administered except through its favor. The remedy is by an appeal to the justice of the nation in that forum, and not in any court of justice, as matter of right.

§ 1678. It has been sometimes thought that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the Constitution itself; but it lies, if at all, against Congress, for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the courts of the United States. In this respect there is a marked contrast between the actual right and practice of redress in the national government, as well as in most of the State governments, and the right and practice maintained under the British constitution. In England, if any person has, in point of property, a just demand upon the king, he may petition him in his court of chancery (by what is called a petition of

¹ See *Hoyt v. Gelston*, 3 Wheat. R. 246; *Osborn v. Bank of United States*, 9 Wheat. R. 738; *Marbury v. Madison*, 1 Cranch, 137, 164, 165; 3 Black. Comm. 255.

right), where the chancellor will administer right, theoretically as a matter of grace, and not upon compulsion,¹ but, in fact, as a matter of constitutional duty. No such judicial proceeding is recognized as existing in any State of this Union, as a matter of constitutional right, to enforce any claim or debt against a State. In the few cases in which it exists it is a matter of legislative enactment.² Congress have never yet acted upon the subject so as to give judicial redress for any non-fulfilment of contracts by the national government. Cases of the most cruel hardship and intolerable delay have already occurred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice which has been yielded only after the humble supplications of many years before the legislature. One can scarcely refrain from uniting in the suggestion of a learned commentator, that in this regard the constitutions, both of the national and State governments, stand in need of some reform to quicken the legislative action in the administration of justice; and that some mode ought to be provided by which a pecuniary right against a State or against the United States might be ascertained and established by the judicial sentence of some court; and when so ascertained and established, the payment might be enforced from the national treasury by an absolute appropriation.³ Surely it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract or property against the crown, and that in a republic there is an utter denial of justice in such cases to any citizen through the instrumentality of any judicial process. He may complain, but he cannot compel a hearing. The republic enjoys a despotic sovereignty to act or refuse as it may please, and is placed beyond

¹ 1 Black. Comm. 243; Comyn's Dig. *Prerogative*, D. 78 to D. 85; The Banker's Case, 1 Freeman, R. 331; s. c. 5 Mod. 29; 11 Harg. State Trials, 137; Skinner's R. 601; 2 Dall. R. 437 to 445. But see *Macbeath v. Haldimand*, 1 T. R. 172, 176, 177.

² A suit against the State has been allowed in Virginia, 1 Tuck. Black. Comm. 243, note (5); *Chisholm v. Georgia*, 2 Dall. R. 419, 434, 435, and Maryland, and some other States by statute. But it is intimated that even when judgment has passed in favor of the claimant, he has sometimes received no substantial benefit from the judgment, from the omission of the legislature to provide suitable funds, or to make suitable appropriations to discharge the debt. 1 Tuck. Black. Comm. App. 352.

³ 1 Tuck. Black. Comm. App. 352.

the reach of law. The monarch bows to the law, and is compelled to yield his prerogative at the footstool of justice.¹

§ 1679. The next clause extends the judicial power "to controversies between two or more States; between a State and the citizens of another State; between citizens of the same State, claiming lands under grants of different States; and between a State or the citizens thereof, and foreign states, citizens, or subjects." (a) Of these we will speak in their order. And, first, "controversies between two or more States."² This power seems to be essential to the preservation of the peace of the Union. "History," says the Federalist,³ "gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the imperial chamber by Maximilian, towards the close of the fifteenth century, and informs us at the same time of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide

¹ Mr. Ch. Justice Jay, in his opinion in the great case of *Chisholm's Executors v. Georgia*, 3 Dall. R. 414, 447, takes a distinction between the case of the suability of a State and the suability of the United States by a citizen under the Constitution, affirming the former and denying the latter. His reason is thus stated: "In all cases of actions against States, or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive powers of the United States. But in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible; and they place the case of a State and the case of the United States in a very different view." In the case of *Macbeath v. Haldimand* (1 Term Reports, 172), Lord Mansfield seemed to intimate great doubts whether a petition of right would lie in England in any case except of a private debt due from the crown, and not for debts contracted under the authority of Parliament. Before the revolution, he said, "all the public supplies were given to the king, who, in his individual capacity, contracted for all expenses. He alone had the disposition of the public money. But since that time the supplies had been appropriated by Parliament to particular purposes; and now, whoever advances money for the public service trusts to the faith of Parliament." *Id.* 176. But see Buller, J's, opinion in the same case. See also Mr. Justice Iredell's opinion in *Chisholm v. Georgia*, 2 Dall. R. 437 to 445.

² In the first draft of the Constitution, the words were to controversies "between two or more States, *except such as shall regard territory or jurisdiction.*" The exception was subsequently abandoned. Journal of Convention, p. 226.

³ The Federalist, No. 80.

(a) See *Cunningham v. Macon R. Co.*, 109 U. S. 446; *New Hampshire v. Louisiana*, 108 U. S. 76, holding that where a citizen cannot sue another State, he cannot sue in the name of his State, though with the assent of such State.

finally all differences among the members of the Germanic body.”¹ But we need not go for illustrations to the history of other countries. Our own has presented, in past times, abundant proofs of the irritating effects resulting from territorial disputes and interfering claims of boundary between the States. And there are yet controversies of this sort which have brought on a border warfare, at once dangerous to public repose and incompatible with the public interests.²

§ 1680. Under the confederation authority was given to the national government to hear and determine (in the manner pointed out in the article) in the last resort, on appeal, all disputes and differences between two or more States concerning boundary, jurisdiction, or any other cause whatsoever.³ Before the adoption of this instrument, as well as afterwards, very irritating and vexatious controversies existed between several of the States in respect to soil, jurisdiction, and boundary, and threatened the most serious public mischiefs.⁴ Some of these controversies were heard and determined by the court of commissioners appointed by Congress. But, notwithstanding these adjudications, the conflict was maintained in some cases until after the establishment of the present Constitution.⁵

§ 1681. Before the revolution, controversies between the colonies concerning the extent of their rights of soil, territory, jurisdiction, and boundary, under their respective charters, were heard and determined before the King in council, who exercised original jurisdiction therein, upon the principles of feudal sovereignty.⁶ This jurisdiction was often practically asserted, as in the case of the dispute between Massachusetts and New Hampshire, decided by the privy council in 1679;⁷ and in the case of the dispute between New Hampshire and New York, in

¹ See also 1 Kent's Comm. Lect. 14, pp. 277, 278 (2d edition, pp. 295, 296); 1 Robertson's Charles V. pp. 183, 395, 397.

² See Sergeant on Const. Introduction, pp. 11 to 16; 2 Elliot's Deb. 418.

³ Confederation, art. 9.

⁴ 2 Elliot's Deb. 418; Sergeant on Const. Introduction, pp. 11, 12, 13, 15, 16; 5 Journ. of Congress, 456; 7 Journ. of Congress, 364; 8 Journ. of Congress, 83; 9 Journ. of Congress, 64; 12 Journ. of Congress, 10, 52, 219, 220, 230.

⁵ New York v. Connecticut, 4 Dall. R. 3; Fowler v. Lindsay, 3 Dall. R. 411; 3 Elliot's Deb. 281; 2 Elliot's Deb. 418.

⁶ 1 Black. Comm. 231.

⁷ *Ante*, vol. i. § 80; 1 Chalm. Annals, 489, 490; 1 Hutch. Hist. 319.

1764.¹ Lord Hardwicke recognized this appellate jurisdiction in the most deliberate manner in the great case of *Penn v. Lord Baltimore*.² The same necessity which gave rise to it in our colonial state must continue to operate through all future time. Some tribunal exercising such authority is essential to prevent an appeal to the sword and a dissolution of the government. That it ought to be established under the national, rather than under the State government, or, to speak more properly, that it can be safely established under the former only, would seem to be a position self-evident, and requiring no reasoning to support it.³ It may justly be presumed, that under the national government, in all controversies of this sort the decision will be impartially made according to the principles of justice, and all the usual and most effectual precautions are taken to secure this impartiality, by confiding it to the highest judicial tribunal.⁴ (a)

§ 1682. Next, "controversies between a State and the citizens of another State." "There are other sources," says the *Federalist*,⁵ (b) "besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will be readily conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances, which have hitherto made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to distract the harmony of the States are proper objects of federal superintendence and control. It may be esteemed the basis of

¹ Sergeant on Const. in Introduction, pp. 5, 6 ; 3 Belknap's Hist. of New Hampshire, 296, App. 10.

² 1 Vesey's R. 444.

³ The *Federalist*, No. 39. See also the remarks of Mr. Chief Justice Jay, *ante*, vol. i. § 488, note ; 2 Elliot's Debates, 418.

⁴ The *Federalist*, Nos. 39, 80.

⁵ *Id.* No. 80.

(a) In *Virginia v. West Virginia*, 11 Wall. 39, this clause of the Constitution is considered, and the previous cases arising under it referred to and examined.

(b) Mr. Hamilton, however, did not interpret this clause as authorizing citizens of one State to sue another State on its contracts. The *Federalist*, No. 81.

the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that, in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." It is added, "The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for it. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens."¹

§ 1683. And here a most important question of a constitutional nature was formerly litigated; and that is, whether the jurisdiction given by the Constitution, in cases in which a State is a party, extended to suits brought *against* a State, as well as *by* it, or was exclusively confined to the latter. It is obvious that if a suit could be brought by any citizen of one State against another State, upon any contract or matter of property, the State would be constantly subjected to judicial action to enforce private rights against it in its sovereign capacity. Accordingly, at a very early period, numerous suits were brought against States by their creditors to enforce the payment of debts or other claims. The question was made and most elaborately considered in the celebrated case of *Chisholm v. Georgia*;² and the majority of the

¹ See also the remarks of Mr. Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dall. R. 474, cited in the note *ante*, vol. i. § 489.

² 2 Dall. R. 419. See also 1 Kent's Comm. Lect. 14, p. 278 (2d edit. pp. 296, 297); *Cohens v. Virginia*, 6 Wheat. R. 381.

Supreme Court held, that the judicial power under the Constitution applied equally to suits brought *by* and *against* a State. The learned judges, on that occasion, delivered *seriatim* opinions, containing the grounds of their respective opinions. It is not my intention to go over these grounds, though they are stated with great ability and legal learning, and exhibit a very thorough mastery of the whole subject.¹ The decision created general alarm among the States; and an amendment was proposed, and ratified by the States,² by which the power was entirely taken away, so far as it regards suits brought *against* a State. It is in the following words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against* one of the United States *by* citizens of another State, or by citizens or subjects of any foreign state." (a) This amendment was construed to include suits then pending, as well as suits to be commenced thereafter; and accordingly all the suits then pending were dismissed, without any further adjudication.³

§ 1684. Since this amendment has been made, a question of equal importance has arisen; and that is, whether the amendment applies to original suits only brought against a State, leav-

¹ Although the controversy is now ended, the opinions deserve a most attentive perusal, from their very able exposition of many constitutional principles. It is remarkable that the Federalist (No. 81) seems to have taken the opposite ground from the majority of the judges, holding that the States were not suable, but might themselves sue under this clause of the Constitution. See also 2 Elliot's Deb. 390, 391, 401, 405. I confess it seems to me difficult to reconcile this position with the reasoning on the same subject in the preceding number (80), a part of which is quoted in the text (§ 1682). Mr. Justice Iredell, who dissented from the other judges of the Supreme Court in *Chisholm v. Georgia*, put his opinion mainly on the ground that it was a suit for a debt for which no action lay, at least compulsively, at the common law against the crown, but, at most, only a petition of right; and, in America, whoever contracts with a State trusts to the good faith of the State.

² In 1793; 3 Dall. R. 378.

³ *Hollingsworth v. Virginia*, 3 Dall. R. 378. The history and reasons of this amendment are succinctly stated by Mr. Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. R. 406.

(a) See *Hagood v. Southern*, 117 U. S. 52; *Louisiana v. Jumel*, 107 U. S. 711. The provision may be waived. *Clark v. Barnard*, 108 U. S. 436. What should appear in the record of a State court to give the federal Supreme Court jurisdiction, see *Parmelee v. Lawrence*, 11 Wall.

36. Further, as to jurisdiction, see *Northern R. Co. v. New York*, 11 Wall. 384; *Knox v. Exchange Bank*, 12 Wall. 379; *Klinger v. Missouri*, 13 Wall. 257; *Bank of West Tennessee v. Citizens' Bank*, Id. 432; *Delmas v. Merchants' Ins. Co.*, 14 Wall. 661.

ing the appellate jurisdiction of the Supreme Court in its full vigor over all constitutional questions arising in the progress of any suit brought by a State in any State court against any private citizen or alien. But this question will more properly come under review when we are considering the nature and extent of the appellate jurisdiction of the Supreme Court. At present, it is only necessary to state that it has been solemnly adjudged, that the amendment applies only to original suits against a State, and does not touch the appellate jurisdiction of the Supreme Court to re-examine, on an appeal or writ of error, a judgment or decree rendered in any State court in a suit brought originally by a State against any private person.¹

§ 1685. Another inquiry suggested by the original clause, as well as by the amendment, is, when a State is properly to be deemed a party to a suit, so as to avail itself of, or to exempt itself from, the operation of the jurisdiction conferred by the Constitution. To such an inquiry the proper answer is, that a State, in the sense of the Constitution, is a party only when it is on the record as such; and it sues or is sued in its political capacity. It is not sufficient that it may have an interest in a suit between other persons, or that its rights, powers, privileges, or duties come therein incidentally in question. It must be in terms a plaintiff or defendant, so that the judgment or decree may be binding upon it, as it is in common suits binding upon parties and privies. The point arose in an early state of the government, in a suit between private persons, where one party asserted the land in controversy to be in Connecticut and the other in New York; and the court held that neither State could be considered as a party.² It has been again discussed in some late cases; and the doctrine now firmly established is, that a State is not a party in the sense of the Constitution unless it appears on the record as such, either as plaintiff or defendant. It is not sufficient that it may have an interest in the cause, or that the parties before the court are sued for acts done, as agents of the State.³(a) In short, the very immunity of a State from

¹ *Cohens v. Virginia*, 6 Wheat. R. 264.

² *Fowler v. Lindsey*, 3 Dall. R. 411; *State of New York v. State of Connecticut*, 4 Dall. R. 1, 3 to 6; *United States v. Peters*, 5 Cranch's R. 115, 139; 1 Kent's Comm. Lect. 15, p. 302 (2d edit. p. 323)

³ The reasoning of Mr. Chief Justice Marshall in *Osborn v. Bank of the United*

(a) See *Hagood v. Southern*, 117 U. S. 52.

being made a party constitutes or may constitute a solid ground why the suit should be maintained against other parties, who

States (9 Wheat. R. 846, &c.) on this point is very full and satisfactory, and deserves to be cited at large. It is only necessary to premise that the suit was a bill in equity, brought by the Bank of the United States against Osborn and others, as State officers, for an injunction and other relief, they having levied a tax of one hundred thousand dollars on certain property of the bank, under a State law of the State of Ohio. "We proceed now," said the Chief Justice, "to the sixth point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a court of chancery, it is against the State of Ohio, in which case the circuit court could not exercise jurisdiction.

"The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the State from executing the law. It is, then, a controversy between the bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the court, though not directed against the State by name, acts directly upon it by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the court ought not to proceed without making the State a party. If this cannot be done, the court cannot take jurisdiction of the cause.

"The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But this was not in the power of the bank. The eleventh amendment of the Constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the State, and on the property in their hands.

"Before we try this question by the Constitution, it may not be time misapplied if we pause for a moment, and reflect on the relative situation of the Union with its members should the objection prevail.

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law of the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties; and the person thus obstructed in the performance of his duty may, indeed, resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of

act as its agents or claim under its title; though otherwise, as the principal, it might be fit that the State should be made a party, upon the common principles of a court of equity.¹

attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs; while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

"These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business. But in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

"The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

"The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

"The State of Ohio denies the existence of this power; and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of the State, can be sustained against such agent; because they would be substantially against the State itself, in violation of the eleventh amendment of the Constitution.

"That the courts of the Union cannot entertain a suit brought against a State by an alien or the citizen of another State, is not to be controverted. Is a suit brought against an individual, for any cause whatever, a suit against a State, in the sense of the Constitution?

"The eleventh amendment is the limitation of a power supposed to be granted in the original instrument; and, to understand accurately the extent of the limitation, it seems proper to define the power that is limited. The words of the Constitution, so far as they respect this question, are: 'The judicial power shall extend to controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, or subjects.' A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which 'a State shall be a party.' The words of the eleventh amendment are: 'The judicial power of the United States shall not be construed to

¹ *Osborn v. Bank of the United States*, 9 Wheat. R. 738, 838 to 845;
The Governor of Georgia v. Madrazo, 1 Peters's Sup. R. 110, 111, 122.

§ 1686. The same principle applies to cases where a State has an interest in a corporation; as, when it is a stockholder in an

extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign state.'

"The Bank of the United States contends, that, in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party. The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest which a State may have in the decision to be made; but is to be considered as a party where the decision acts directly and immediately upon the State, through its officers.

"If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party who is not made so in the record. But the court will not review those decisions; because it is thought a question growing out of the Constitution of the United States requires rather an attentive consideration of the words of that instrument than of the decisions of analogous questions by the courts of any other country.

"Do the provisions, then, of the American Constitution respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record? The first in the enumeration is a controversy between two or more States. There are not many questions in which a State would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the Constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the Constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the Constitution does not consider the State as a party in such a case. Jurisdiction is expressly granted in those cases only where citizens of the same State claim lands under grants of different States. If the claimants be citizens of different States, the court takes jurisdiction for that reason. Still, the right of the State to grant is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the Constitution will be construed to forbid the circuit courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

"We are aware that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the court where its judgment does not act directly upon the property or interests of the State; but we deemed it of some importance to show, that the framers of the Constitution contemplated the distinction between cases in which a State was interested and those in which it was a party, and made no provision for a case of interest, without being a party on the record. In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without

incorporated bank, the corporation is still suable although the State, as such, is exempted from any action.¹ The State does

having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

"The next in the enumeration is a controversy between a State and the citizens of another State. Can this case arise, if the State be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the federal court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and on the proceedings of the State against him may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officer. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted in argument that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detainee. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

"It would be tedious to pursue this part of the inquiry further, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one, where the nature of the controversy is in some degree blended with the character of the party.

"If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary or of his servant is arrested. The minister does not, by the mere arrest of his secretary or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court and asserts his privilege. If the suit affects a foreign minister it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers it was intended, for reasons which all com-

¹ *United States Bank v. Planters Bank of Georgia*, 9 Wheat. R. 904; *Bank of Commonwealth of Kentucky v. Wister*, 3 Peters's Sup. C. R. 318.

not, by becoming a corporator, identify itself with the corporation. The bank, in such a case, is not the State, although the

prehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

"In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, 'controversies to which the United States shall be a party.' Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy? Let us examine this question. Suits brought by the postmaster-general are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the courts of the Union under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

"The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected, that if the executor be a resident of another State, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record. Were a State to be the sole legatee, it will not, we presume, be alleged, that the jurisdiction of the court in a suit against the executor would be more affected by this fact than by the fact that any other person not suable in the courts of the Union was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the State.

"This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that under the distributive clause of the second section of the third article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

"But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction

State holds an interest in it. Nor will it make any difference in the case, that the State has the sole interest in the corporation, if, in fact, it creates other persons corporators.¹ An analogous case will be found in the authority given by an act of Congress to the postmaster-general to bring suits in his official capacity. (a) In such suits the United States are not understood to be a party, although the suits solely regard their interests. The postmaster-general does not, in such cases, sue under the clause giving jurisdiction "in controversies to which the United States shall be a party;" but under the clause extending the jurisdiction to cases arising under the laws of the United States.²

§ 1687. The reasoning by which the general doctrine is maintained is to the following effect. It is a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is transacted. Thus, many States in the Union which have an interest in banks are not suable even in their own courts. A State which establishes a bank, and becomes a stockholder in it, and gives it a capacity to sue and be sued, strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and

granted by the Constitution over suits against States, is of necessity limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State, or by aliens. The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether in the exercise of its jurisdiction the court ought to make a decree against the defendants, whether they are to be considered as having a real interest, or as being only nominal parties."

¹ Bank of Commonwealth of Kentucky v. Wister, 3 Peters's Sup. C. R. 318.

² Osborn v. Bank of United States, 9 Wheat. R. 855, 856; Postmaster-General v. Early, 12 Wheat. R. 136, 149.

(a) Comp. Hagood v. Southern, 117 U. S. 196; Poindexter v. Greenhow, 114 U. S. 52; Cunningham v. Macon R. Co., U. S. 270.
109 U. S. 446; United States v. Lee, 106

exercises no other powers in the management of the affairs of the corporation than are expressly given by the incorporating act. The United States held shares in the old Bank of the United States, but the privileges of the government were not imparted by that circumstance to the bank. The United States were not a party to suits brought by or against the bank, in the sense of the Constitution. So, with respect to the present bank, suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporation, lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.¹ The reasoning admits of further illustration. A corporation is itself, in legal contemplation, an artificial person having a distinct and independent existence from that of the persons composing it. It is this personal, political, and artificial existence which gives it the character of a body politic or corporate, in which may be vested peculiar powers and attributes, distinct and different from those belonging to the natural persons composing it.² Thus, the corporation may be perpetual, although the individuals composing it may in succession die. It may have privileges, and immunities, and functions which do not and cannot lawfully belong to individuals. It may exercise franchises and transact business prohibited to its members as individuals. The capacity to sue and be sued belongs to every corporation, and, indeed, is a function incident to it, independent of any special grant, because necessary to its existence.³ It sues and is sued, however, not in the names of its members, but in its own name as a distinct person. It acts, indeed, by and through its members or other proper functionaries, but still the acts are its own, and not the private acts of such members or functionaries. The members are not only not parties to its suits in any legal sense, but they may sue it or be sued by it in any action, exactly as any stranger may sue it or be sued by it. A State may sue a bank in which it is a stockholder, just as any other stockholder may sue the same bank. The United States may sue the Bank of the United States, and entitle themselves to a judgment for any debt due to

¹ *United States Bank v. Planters Bank of Georgia*, 9 Wheat. R. 907, 908.

² See 1 Black. Comm. ch. 18, pp. 467, 471, 475, 477.

³ 1 Black. Comm. 475, 476.

them; and they may satisfy the execution issuing on such a judgment out of any property of the bank. Now, it is plain that this could not be done if the State, or the United States, or any other stockholder, were deemed a party to the record. It would be past all legal comprehension that a party might sue himself and be on both sides of the controversy. So that any attempt to deem a State a party to a suit, simply because it has an interest in a suit, or is a stockholder in a corporation on the records, would be to renounce all ordinary doctrines of law applicable to such cases. The framers of the Constitution must be presumed, in treating of the judicial department, to have used language in the sense and with the limitations belonging to it in judicial usage. They must have spoken according to known distinctions and settled rules of interpretation, incorporated into the very elements of the jurisprudence of every State in the Union.

§ 1688. It may then be laid down, as a rule which admits of no exception, that in all cases under the Constitution of the United States where jurisdiction depends upon the party, it is the party ~~named on the record~~. Consequently the amendment above referred to, which restrains the jurisdiction granted by the Constitution over suits against States, is of necessity limited to those suits in which a State is a party on the record. The amendment has its full effect if the Constitution is construed as it would have been construed had the jurisdiction never been extended to suits brought against a State by the citizens of another State, or by aliens.¹

§ 1689. It has been doubted whether this amendment extends to cases of admiralty and maritime jurisdiction, where the proceeding is *in rem* and not *in personam*. There the jurisdiction of the court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the amendment is, that "the judicial power of the United States shall not be construed to extend to any suit *in law or equity*." But a suit in the admiralty is not,

¹ *Osborn v. United States Bank*, 9 Wheat. R. 857, 858; *The Governor of Georgia v. Madrazo*, 1 Peters's Sup. R. 110, 122. A State may be properly deemed a party when it sues or is sued by process by or against the governor of the State in his official capacity. *The Governor of Georgia v. Madrazo*, 1 Peters's Sup. R. 110, 121, 124.

correctly speaking, a suit in law or in equity, but is often spoken of in contradistinction to both.¹

§ 1690. Next. "Controversies between citizens of different States." Although the necessity of this power may not stand upon grounds quite as strong as some of the preceding, there are high motives of State policy and public justice by which it can be clearly vindicated. There are many cases in which such a power may be indispensable, or in the highest degree expedient, to carry into effect some of the privileges and immunities conferred, and some of the prohibitions upon States expressly declared in the Constitution. For example, it is declared that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. Suppose an attempt is made to evade or withhold these privileges and immunities, would it not be right to allow the party aggrieved an opportunity of claiming them, in a contest with a citizen of the State, before a tribunal at once national and impartial?² Suppose a State should pass a tender law, or law impairing the obligation of private contracts, or should, in the course of its legislation, grant unconstitutional preferences to its own citizens, is it not clear that the jurisdiction to enforce the obligations of the Constitution in such cases ought to be confided to the national tribunals? These cases are not purely imaginary. They have actually occurred, and may again occur, under peculiar circumstances in the course of State legislation.³ What was the fact under the confederation? Each State was obliged to acquiesce in the degree of justice which another State might choose to yield to its citizens.⁴ There was not only danger of animosities growing up from this source, but, in point of fact, there did grow up retaliatory legislation to meet such real or imagined grievances.

§ 1691. Nothing can conduce more to general harmony and confidence among all the States than a consciousness that contro-

¹ See *United States v. Blight*, 3 Hall's Law Journal, 197, 225; *The Governor of Georgia v. Madrazo*, 1 Peters's Sup. R. 124. and *Id.* 128, 129, 130, 131, 132, 133, the opinion of Mr. Justice Johnson; *United States v. Peters*, 5 Cranch's R. 115, 139, 140.

² *The Federalist*, No. 80; *Id.* No. 42.

³ See 2 Elliot's Debates, 391, 392, 401, 406; 3 Elliot's Debates, 142, 144, 277, 282.

⁴ See *Chisholm v. Georgia*, 2 Dall. R. 474, 475, 476, per Mr. Chief Justice Jay; *The Federalist*, No. 80; 3 Elliot's Debates, 142, 144, 277, 282; *Martin v. Hunter*, 1 Wheat. R. 346, 347.

versies are not exclusively to be decided by the State tribunals, but may, at the election of the party, be brought before the national tribunals. Besides, it cannot escape observation that the judges in different States hold their offices by a very different tenure. Some hold during good behavior; some for a term of years; some for a single year; some are irremovable, except upon impeachment; and others may be removed upon address of the legislature. Under such circumstances it cannot but be presumed that there may arise a course of State policy, or State legislation, exceedingly injurious to the interests of the citizens of other States both as to real and personal property. It would require an uncommon exercise of candor or credulity to affirm that, in cases of this sort, all the State tribunals would be wholly without State prejudice or State feelings, or that they would be as earnest in resisting the encroachments of State authority upon the just rights and interests of the citizens of other States as a tribunal differently constituted and wholly independent of State authority. And if justice should be as fairly and as firmly administered in the former as in the latter, still the mischiefs would be most serious if the public opinion did not indulge such a belief. Justice, in cases of this sort, should not only be above all reproach, but above all suspicion. The sources of State irritations and State jealousies are sufficiently numerous without leaving open one so copious and constant as the belief or the dread of wrong in the administration of State justice.¹ Besides, if the public confidence should continue to follow the State tribunals (as in many cases it doubtless will), the provision will become inert and harmless; for as the party will have his election of the forum, he will not be inclined to desert the State courts unless for some sound reason, founded either in the nature of his cause or in the influence of State prejudices.² On the other hand, there can be no real danger of injustice to the other side in the decisions of the national tribunals, because the cause must still be decided upon the true principles of the local law, and not by any foreign jurisprudence.³ There is another circumstance of no small importance, as a matter of policy, and that

¹ See *The Federalist*, No. 80; 4 *Dall.* 474, 475, 476, per Mr. Chief Justice Jay; 1 *Kent's Comm. Lect.* 14, p. 276 (2d edit. p. 296); 3 *Elliot's Debates*, 141, 142, 144.

² See *Rawle on Const.* ch. 31, p. 204; 3 *Elliot's Deb.* 381, 382.

³ 2 *Elliot's Debates*, 401, 402, 406. -

is, the tendency of such a power to increase the confidence and credit between the commercial and agricultural States. No man can be insensible to the value in promoting credit of the belief of there being a prompt, efficient, and impartial administration of justice in enforcing contracts.¹

§ 1692. Such are some of the reasons which are supposed to have influenced the convention in delegating jurisdiction to the courts of the United States in cases between citizens of different States. Probably no part of the judicial power of the Union has been of more practical benefit or has given more lasting satisfaction to the people. There is not a single State which has not at some time felt the influence of this conservative power; and the general harmony which exists between the State courts and the national courts, in the concurrent exercise of their jurisdiction in cases between citizens of different States, demonstrates the utility as well as the safety of the power. Indeed, it is not improbable that the existence of the power has operated as a silent but irresistible check to undue State legislation, at the same time that it has cherished a mutual respect and confidence between the State and national courts, as honorable as it has been beneficent.

§ 1693. The next inquiry growing out of this part of the clause is, who are to be deemed citizens of different States within the meaning of it? Are all persons born within a State to be always deemed citizens of that State, notwithstanding any change of domicile; or does their citizenship change with their change of domicile? The answer to this inquiry is equally plain and satisfactory. The Constitution having declared that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, every person who is a citizen of one State and removes into another, with the intention of taking up his residence and inhabitancy there, becomes *ipso facto* a citizen of the State where he resides, and he then ceases to be a citizen of the State from which he has removed his residence. Of course, when he gives up his new residence or domicile and returns to his native or other State residence or domicile, he reacquires the character of the latter. What circumstances shall constitute such a change of residence or domicile is an inquiry more properly belonging to a treatise upon public or municipal

¹ 2 Elliot's Debates, 392, 406; 3 Elliot's Debates, 144; Id. 282.

law than to commentaries upon constitutional law. In general, however, it may be said that a removal from one State into another, *animo manendi*, or with a design of becoming an inhabitant, constitutes a change of domicil, and, of course, a change of citizenship. But a person who is a native citizen of one State never ceases to be a citizen thereof until he has acquired a new citizenship elsewhere. Residence in a foreign country has no operation upon his character as a citizen, although it may, for purposes of trade and commerce, impress him with the character of the country.¹ To change allegiance is one thing; to change inhabitancy is quite another thing. The right and the power are not coextensive in each case.² Every citizen of a State is *ipso facto* a citizen of the United States.³ (a)

§ 1694. And a person who is a naturalized citizen of the United States by a like residence in any State in the Union, becomes *ipso facto* a citizen of that State. So a citizen of a territory of the Union by a like residence acquires the character of the State where he resides.⁴ But a naturalized citizen of the United States, or a citizen of a territory, is not a citizen of a State, entitled to sue in the courts of the United States in virtue of that character, while he resides in any such territory, nor until he has acquired a residence or domicil in the particular State.⁵

§ 1695. A corporation, as such, is not a citizen of a State in the sense of the Constitution. But if all the members of the

¹ See 1 Kent's Comm. Lect. 4.

² See Rawle on Const. ch. 9, pp. 87 to 100.

³ Rawle on Const. ch. 9, pp. 85, 86.

⁴ See *Gassies v. Ballon*, 6 Peters's Sup. R. 761.

⁵ *Hepburn v. Elszey*, 2 Cranch, 448; *Corporation of New Orleans v. Winter*, 1 Wheat. R. 91; 1 Kent's Comm. Lect. 17, p. 360 (2d edition, p. 384).

(a) In *Dred Scott v. Sandford*, 19 How. 393, the opinion was expressed by a majority of the court that at the time of the adoption of the Constitution, a person of the African race whose ancestors had been brought to this country and sold as slaves, was not, though free, a citizen, and therefore such a person could not sue in the federal courts under the clause of the Constitution under examination. Now, however, "all persons born or naturalized in the United States, and subject to the ju-

risdiction thereof, are citizens of the United States and of the State wherein they reside." 14th Amend. to U. S. Const., 1st clause. See *post*, chapter 47.

But citizenship of the United States does not confer the right of suffrage even upon males twenty-one years of age; the States may prescribe the qualifications for voters even in respect of federal office. See *United States v. Cruikshank*, 92 U. S. 548; *Minor v. Happerstett*, 21 Wall. 162.

corporation are citizens, their character will confer jurisdiction, for then it is substantially a suit by citizens suing in their corporate name.¹ (a) And a citizen of a State is entitled to sue, as such, notwithstanding he is a trustee for others, or sues in *autre droit*, as it is technically called; that is, as representative of another. Thus a citizen may sue who is a trustee at law, for the benefit of the person entitled to the trust. And an administrator and executor may sue for the benefit of the estate which they represent, for in each of these cases it is their personal suit.² But if citizens who are parties to a suit are merely nominally so, as for instance, if magistrates are officially required to allow suits to be brought in their names for the use or benefit of a citizen or alien, the latter are deemed the substantial parties entitled to sue.³

§ 1696. Next. "Controversies between citizens of the same State, claiming lands under grants of different States." This clause was not in the first draft of the Constitution, but was added without any known objection to its propriety.⁴ It is the only instance in which the Constitution directly contemplates the cognizance of disputes between citizens of the same State;⁵ but certainly not the only one in which they may indirectly upon constitutional questions have the benefit of the judicial power of the Union.⁶ The Federalist has remarked that the reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause, or

¹ Hope Insurance Company v. Boardman, 5 Cranch, 57; Bank of United States v. Devaux, 5 Cranch, 61; United States v. Planters Bank, 9 Wheat. R. 410.

² Chappedelaine v. De Chenaux, 4 Cranch, 306; Bank of United States v. Devaux, 5 Cranch, 61; Childress v. Emory, 8 Wheat. R. 668.

³ Brown v. Strode, 5 Cranch, 303.

⁴ Journal of Convention, 226, 300.

⁵ The Federalist, No. 80.

⁶ Cohens v. Virginia, 6 Wheat. R. 390, 391, 392.

(a) See Commercial Bank v. Slocum, 14 Pet. 60; Marshall v. Baltimore R. Co., 16 How. 314. In Ohio R. Co. v. Wheeler, 1 Black, 286, a decision was made which modifies previous rulings. It was there held that the legal presumption is, that the corporators are citizens of the State granting the franchise in which alone the corporate body has a legal existence; that a suit by or against

it must be presumed to be a suit by or against citizens of such State, and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the court of the United States. See also Insurance Co. v. Francis, 11 Wall. 210; Railroad Co. v. Harris, 12 Wall. 65; Railroad Co. v. Whitton, 13 Wall. 270.

in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And where this has not been done, it would be natural that the judges, as men, should feel a strong predilection for the claims of their own government.¹ And, at all events, the providing of a tribunal having no possible interest on the one side more than the other, would have a most salutary tendency in quieting the jealousies and disarming the resentments of the State whose grant should be held invalid. This jurisdiction attaches not only to grants made by different States which were never united, but also to grants made by different States which were originally united under one jurisdiction, if made since the separation, although the origin of the title may be traced back to an antecedent period.²

§ 1697. Next. "Controversies between a State, or the citizens thereof, and foreign states, citizens, or subjects." The Federalist³ has vindicated this provision in the following brief but powerful manner: "The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public

¹ The Federalist, No. 80. See also Mr. Chief Justice Jay's Remarks, 4 Dall. 476, and *ante*, § 1638.

² Town of Pawlett v. Clarke, 9 Cranch, 292; Colson v. Lewis, 2 Wheat. R. 377.

³ The Federalist, No. 80. See also 3 Elliot's Debates, 283; 2 Elliot's Debates, 391.

tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction; the later for that of the States. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the controversies in which foreigners are parties involve national questions, that it is by far the most safe and most expedient to refer all those in which they are concerned to the national tribunals."

§ 1698. In addition to these suggestions, it may be remarked, that it is of great national importance to advance public as well as private credit in our intercourse with foreign nations and their subjects. Nothing can be more beneficial in this respect than to create an impartial tribunal to which they may have resort upon all occasions when it may be necessary to ascertain or enforce their rights.¹ Besides, it is not wholly immaterial that the law to be administered in cases of foreigners is often very distinct from the mere municipal code of a State, and dependent upon the law merchant, or the more enlarged consideration of international rights and duties in a case of conflict of the foreign and domestic laws.² And it may fairly be presumed that the national tribunals will, from the nature of their ordinary functions, become better acquainted with the general principles which regulate subjects of this nature, than other courts, however enlightened, which are rarely required to discuss them.

¹ 3 Elliot's Debates, 142, 143, 144, 282, 283. It is notorious that this jurisdiction has been very satisfactory to foreign nations and their subjects. Nor have the dangers of State prejudice, and State attachment to local interests, to the injury of foreigners, been wholly imaginary. It has been already stated in another place, that the debts due to British subjects before the revolution were never recovered until after the adoption of the Constitution, by suits brought in the national courts. See *Ware v. Hylton*, 3 Dall. R. 199.

² See 1 Tuck. Black. Comm. App. 421; 3 Elliot's Deb. 282, 283.

§ 1699. In regard to controversies between an American and a foreign state, it is obvious that the suit must, on the one side at least, be wholly voluntary. No foreign state can be compelled to become a party, plaintiff, or defendant in any of our tribunals.¹ If, therefore, it chooses to consent to the institution of any suit, it is its consent alone which can give effect to the jurisdiction of the court. It is certainly desirable to furnish some peaceable mode of appeal in cases where any controversy may exist between an American and a foreign state sufficiently important to require the grievance to be redressed by any other mode than through the instrumentality of negotiations.²

§ 1700. The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States? The general answer is, any person who is not a citizen of the United States. A foreigner who is naturalized is no longer entitled to the character of an alien.³ And when an alien is the substantial party, it matters not whether he is a suitor in his own right, or whether he acts as a trustee, or personal representative, or whether he is compellable by the local law to sue through some official organ.⁴ A foreign corporation established in a foreign country, all of whose members are aliens, is entitled to sue in the same manner that an alien may personally sue in the courts of the Union.⁵ It is not sufficient, to vest the jurisdiction, that an alien is a party to the suit, unless the other party be a citizen.⁶ British subjects, born before the American revolution, are to be deemed aliens, and may sue American citizens, born before the revolution, as well as those born since that period. The revolution severed the ties of allegiance, and made the inhabitants of each country aliens to each other.⁷ In relation to

¹ See 2 Elliot's Deb. 391, 407; *Foster v. Nelson*, 2 Peters's R. 254, 307.

² See also 3 Elliot's Debates, 232, 283.

³ Mr. Tucker supposes that the several States still retain the power of admitting aliens to become denizens of the State; but that they do not thereby become citizens. 1 Tuck. Black. Comm. App. 365. What he means by "denizens" he has not explained. If he means that the States may naturalize so far as to make an alien a citizen of the State, that may be well questioned. If he means only that they may enable aliens to hold lands and enjoy certain other qualified privileges within the State, that will not be denied.

⁴ *Chappelaine v. De Cheneaux*, 4 Cranch, 306; *Brown v. Strode*, 5 Cranch, R. 303.

⁵ *Society for Propagating the Gospel v. Town of New Haven*, 8 Wheat. R. 464.

⁶ *Jackson v. Twentyman*, 2 Peters's Sup. C. R. 136.

⁷ *Daswon's Lessee v. Godfrey*, 4 Cranch, 321; *Blight's Lessee v. Rochester*, 7 Wheat. R. 535; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Peters's Sup. C. R. 126.

aliens, however, it should be stated, that they have a right to sue only while peace exists between their country and our own. For if a war breaks out, and they thereby become alien enemies, their right to sue is suspended until the return of peace.¹

§ 1701. We have now finished our review of the classes of cases to which the judicial power of the United States extends. The next inquiry naturally presented is, in what mode it is to be exercised, and in what courts it is to be vested. The succeeding clause of the Constitution answers this inquiry. It is in the following words: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction. In all the other cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."²(a)

§ 1702. The first remark arising out of this clause is, that, as the judicial power of the United States extends to all the cases enumerated in the Constitution, it may extend to all such cases in any form in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.³ But it is clear, from the language of the Constitution,

¹ 1 Kent's Comm. Lect. 3, pp. 64, 65 (2d edition, pp. 68, 69).

² In the first draft of the Constitution, the words stood thus: "In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction [of the Supreme Court] shall be original. In all other cases before mentioned, *it shall be appellate*, with such exceptions and under such regulations as the legislature may make. The legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States), in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time." It was varied to its present form by successive votes, in which there was some difference of opinion. Journal of Convention, pp. 226, 227, 299, 300, 301.

³ *Martin v. Hunter*, 1 Wheat. R. 333, 337, 338; *Osborn v. Bank of United States*, 9 Wheat. R. 820, 821.

(a) The jurisdiction of the Supreme Court in cases respecting the boundaries of States, is not precluded because of their involving the consideration of questions purely political; that is to say, because of the main question to be decided being the conflicting claims of two States

to the exercise of political jurisdiction and sovereignty over the territory in dispute, and over the inhabitants occupying the same. *Rhode Island v. Massachusetts*, 12 Pet. 724; *Virginia v. West Virginia*, 11 Wall. 39.

that, in one form or the other, it is absolutely obligatory upon Congress to vest all the jurisdiction in the national courts in that class of cases at least where it has declared that it shall extend to "*all cases.*"¹ (a)

§ 1703. In the next place, the jurisdiction which is by the Constitution to be exercised by the Supreme Court in an *original* form is very limited, and extends only to cases affecting ambassadors, and other public ministers and consuls, and cases where a State is a party. And Congress cannot constitutionally confer on it any other or further original jurisdiction. (b) This is one of the appropriate illustrations of the rule, that the affirmation of a power in particular cases excludes it in all others. The clause itself would otherwise be wholly inoperative and nugatory. If it had been intended to leave it to the discretion of Congress to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would have been useless to have proceeded further than to define the judicial power and the tribunals in which it should be vested. Affirmative words often, in their operation, imply a negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to the words, or they have no operation at all. If the solicitude of the convention respecting our peace with foreign powers might induce a provision to be made that the Supreme Court should have original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases, unless some further restriction upon the powers of Congress had been intended. The direction, that the Supreme Court shall have appellate jurisdiction in all cases, with such exceptions as Congress shall make, will be no restriction unless the words are to be deemed exclusive of original jurisdiction.² And accord-

¹ Id. pp. 328, 330, 336. Upon this subject there is considerable discussion in the case of *Martin v. Hunter*. 1 Wheat. R. 304, 313.

² *Marbury v. Madison*, 1 Cranch, R. 174, 175; *Wiscart v. Dauchy*, 3 Dall. R. 321;

(a) In cases where original jurisdiction is by the Constitution conferred upon the Supreme Court, the court may exercise it without any further act of Congress to regulate its process or confer jurisdiction. *Kentucky v. Dennison*, 24 How. 66.

(b) Chief Justice Jay was of opinion

that Congress could not require or authorize the justices of the Supreme Court to exercise original jurisdiction as justices of the circuit or other inferior courts. See his argument in the *Life and Correspondence of Judge Iredell*, II. 292.

ingly the doctrine is firmly established, that the Supreme Court cannot constitutionally exercise any original jurisdiction, except in the enumerated cases. If Congress should confer it, it would be a mere nullity.¹

§ 1704. But although the Supreme Court cannot exercise original jurisdiction in any cases except those specially enumerated, it is certainly competent for Congress to vest in any inferior courts of the United States original jurisdiction of all other cases not thus specially assigned to the Supreme Court; for there is nothing in the Constitution which excludes such inferior courts from the exercise of such original jurisdiction. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power; and except so far as the Constitution has made any distribution of it among the courts of the United States, it remains to be exercised in an original or appellate form, or both, as Congress may in their wisdom deem fit. Now, the Constitution has made no distinction, except of the original and appellate jurisdiction of the Supreme Court. It has nowhere insinuated that the inferior tribunals shall have no original jurisdiction. It has nowhere affirmed that they shall have appellate jurisdiction. Both are left unrestricted and undefined. Of course, as the judicial power is to be vested in the supreme and inferior courts of the Union, both are under the entire control and regulation of Congress.²

§ 1705. Indeed it has been a matter of much question, whether the grant of original jurisdiction to the Supreme Court in the enumerated cases ought to be construed to give to that court exclusive original jurisdiction, even in those cases. And it has been contended that there is nothing in the Constitution which warrants the conclusion that it was intended to exclude the inferior courts of the Union from a concurrent original jurisdic-

Cohens v. Virginia, 6 Wheat. R. 392 to 395; *Id.* 400, 401; *Osborn v. Bank of United States*, 9 Wheat. R. 820, 821.

¹ *Ibid.*; 1 Kent's Comm. Lect. 15, pp. 294, 301 (2d edition, pp. 314, 322); *Wiscart v. Dauchy*, 3 Dall. R. 321. Congress, by the judiciary act of 1789, ch. 20, § 13, did confer on the Supreme Court the authority to issue writs of mandamus, in cases warranted by the principles and usages of law, to persons holding office under the authority of the United States. But the Supreme Court, in 1801, held the delegation of power to be a mere nullity. *Marbury v. Madison*, 1 Cranch, R. 137, 173 to 180.

² *Martin v. Hunter*, 1 Wheat. R. 337, 338; *Osborn v. Bank of United States*, 9 Wheat. R. 820, 821; *Cohens v. Virginia*, 6 Wheat. R. 395, 396.

tion.¹ The judiciary act of 1789 (ch. 20, §§ 11, 13) has manifestly proceeded upon the supposition that the jurisdiction was not exclusive, but that concurrent original jurisdiction in those cases might be vested by Congress in inferior courts.² It has been strongly intimated, indeed, by the highest tribunal, on more than one occasion, that the original jurisdiction of the Supreme Court in those cases is exclusive;³ but the question remains to this hour without any authoritative decision.⁴

§ 1706. Another question of a very different nature is, whether the Supreme Court can exercise appellate jurisdiction in the class of cases of which original jurisdiction is delegated to it by the Constitution; in other words, whether the original jurisdiction excludes the appellate; and so, *e-converso*, the latter implies a negative of the former. It has been said that the very distinction taken in the Constitution between original and appellate jurisdiction presupposes that where the one can be exercised the other cannot. For example, since the original jurisdiction extends to cases where a State is a party, this is the proper form in which such cases are to be brought before the Supreme Court; and, therefore, a case where a State is a party cannot be brought before the court in the exercise of its appellate jurisdiction; for the affirmative here, as well as in the cases of original jurisdiction, includes a negative of the cases not enumerated.

§ 1707. If the correctness of this reasoning were admitted it would establish no more than that the Supreme Court could not exercise appellate jurisdiction in cases where a State is a party. But it would by no means establish the doctrine that the judicial power of the United States did not extend in an appellate form to such cases. The exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a suc-

¹ *United States v. Ravara*, 2 Dall. R. 297; *Chisholm v. Georgia*, 2 Dall. R. 419, 431, 436, per Iredell, J.; Sergeant on Const. ch. 2.

² 1 Kent's Comm. Lect. 15, pp. 294, 295 (2d edition, pp. 314, 315). See *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 723.

³ See *Marbury v. Madison*, 1 Cranch, R. 137; *Martin v. Hunter*, 1 Wheat. R. 337, 338; *Osborn v. Bank of United States*, 9 Wheat. R. 820, 821; 1 Kent's Comm. Lect. 15, pp. 294, 295 (2d edition, pp. 314, 315); *Cohens v. Virginia*, 6 Wheat. R. 395, 396, 397.

⁴ *United States v. Ortega*, 11 Wheat. R. 467; *Cohens v. Virginia*, 6 Wheat. R. 396, 397.

cession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. This results from the very nature of the delegation of the judicial power in the Constitution. It is delegated in the most general terms; and may therefore be exercised, under the authority of Congress, under every variety of form of original and appellate jurisdiction. There is nothing in the instrument which restrains or limits the power; and it must, consequently, subsist in the utmost latitude of which it is in its nature susceptible.¹ The result then would be, that if the appellate jurisdiction over cases to which a State is a party could not, according to the terms of the Constitution, be exercised by the Supreme Court, it might be exercised exclusively by an inferior tribunal. The soundness of any reasoning which would lead us to such a conclusion may well be questioned.²

§ 1708. But the reasoning itself is not well founded. It proceeds upon the ground that because the character of the *party* alone, in some instances, entitles the Supreme Court to maintain original jurisdiction without any reference to the nature of the

¹ *Martin v. Hunter*, 1 Wheat. R. 327, 338; *Osborn v. Bank of United States*, 9 Wheat. R. 820, 821; *Cohens v. Virginia*, 6 Wheat. R. 392 to 396.

² The *Federalist*, No. 82, has spoken of the right of Congress to vest appellate jurisdiction in the inferior courts of the United States from State courts (for it had before expressly affirmed that of the Supreme Court in such cases) in the following terms: "But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention in the first place authorizes the national legislature 'to constitute tribunals inferior to the Supreme Court.' It declares, in the next place, that 'the judicial power of the United States *shall be vested* in one Supreme Court, and in such inferior courts as Congress shall ordain and establish;' and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are, that they shall be 'inferior to the Supreme Court,' and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the Union."

case, therefore the character of the *case*, which in other instances is made the very foundation of appellate jurisdiction, cannot attach. Now that is the very point of controversy. It is not only not admitted, but it is solemnly denied. The argument might just as well, and with quite as much force, be pressed in the opposite direction. It might be said that the appellate jurisdiction is expressly extended by the Constitution to all cases in law and equity arising under the Constitution, laws, and treaties of the United States, and therefore in no such cases could the Supreme Court exercise original jurisdiction, even though a State were a party.

§ 1709. But this subject has been expounded in so masterly a manner by Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court in a very celebrated case,¹ that it will be more satisfactory to give the whole argument in his own language. "The Constitution," says he, "gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under the Constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

§ 1710. "In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature

¹ *Cohens v. Virginia*, 6 Wheat. R. 264, 392, *et seq.*

of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction in cases where a State shall be a party to be original, and in all cases arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a State is a party, and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law. This reasonable construction is rendered necessary by other considerations. That the Constitution, or a law of the United States, is involved in a case and makes a part of it, may appear in the progress of a cause in which the courts of the Union but for that circumstance would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause dividing the power of the Supreme Court in such manner as in a considerable degree to defeat the power itself. All must perceive that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

§ 1711. "It is observable that in this distributive clause no negative words are introduced. This observation is not made for the purpose of contending that the legislature may 'apportion the judicial power between the supreme and inferior courts according to its will.' That would be, as was said by this court in the case of *Marbury v. Madison*, to render the distributive clause 'mere surplusage,' to make it 'form without substance.' This cannot, therefore, be the true construction of the article. But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted that 'affirmative words are often in their operation negative of other objects than those affirmed,' and that where a 'negative or exclusive sense must be given to them, or they have no operation at all,' they must receive that negative or exclusive sense. But where they have full operation without it, where it would destroy some of the most important objects for which the

power was created,— then, we think, affirmative words ought not to be construed negatively.

§ 1712. “The Constitution declares that in cases where a State is a party the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party.¹ It may be conceded that where the case is of such a nature as to admit of its originating in the Supreme Court it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult and subversive of the spirit of the Constitution to maintain the construction that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court. The Constitution defines the jurisdiction of the Supreme Court, but does not define that of the inferior courts. Can it be affirmed that a State might not sue the citizen of another State in a circuit court? Should the circuit court decide for or against its jurisdiction, should it dismiss the suit or give judgment against the State, might not its decision be revised in the Supreme Court? The argument is that it could not; and the very clause which is urged to prove that the circuit court could give no judgment in the case is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because in the same case that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But without negative words this irrational construction can never be maintained.

§ 1713. “So, too, in the same clause the jurisdiction of the court is declared to be original ‘in cases affecting ambassadors, other public ministers, and consuls.’ There is, perhaps, no part of the article under consideration so much required by national policy as this, unless it be that part which extends the judicial power ‘to all cases arising under the Constitution, laws, and treaties of the United States.’ It has been generally held that the State courts have a concurrent jurisdiction with the

¹ See 9 Wheat. R. 820, 821.

federal courts in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words 'to all cases' give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the Constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a State court, and that court were to maintain its jurisdiction and render judgment against the minister, could it be contended that this court would be incapable of revising such judgment because the Constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court nor suspend its proceedings, for a writ of prohibition or any other similar writ is in the nature of appellate process.

§ 1714. "Foreign consuls frequently assert in our prize courts the claims of their fellow-subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court. It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation in every possible case, would in some instances defeat the obvious intention of the article. Such an interpretation would not consist with those rules which from time immemorial have guided courts in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words and promote its general

intention. The court may imply a negative from affirmative words where the implication promotes, not where it defeats the intention.

§ 1715. "If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the Supreme Court in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a State and its citizens, and perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the Constitution in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent. The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of *Marbury v. Madison*.¹

§ 1716. "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely

¹ 1 Cranch, R. 174, 175, 176.

investigated. In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision some expressions are used which go far beyond it. The counsel for *Marbury* had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power, and it is against this argument that the reasoning of the court is directed. They say that if such had been the intention of the article, 'it would certainly have been useless to proceed further than to define the judicial power and the tribunals in which it should be vested.' The court says that such a construction would render the clause dividing the jurisdiction of the court into original and appellate totally useless; that 'affirmative words are often in their operation negative of other objects than those which are affirmed; and in this case [in the case of *Marbury v. Madison*] a negative or exclusive sense must be given to them, or they have no operation at all.' 'It cannot be presumed,' adds the court, 'that any clause in the Constitution is intended to be without effect, and therefore such a construction is inadmissible unless the words require it.'

§ 1717. "The whole reasoning of the court proceeds upon the idea, that the affirmative words of the clause, giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative; and this reasoning is advanced in a case to which it was strictly applicable. If, in that case, original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but, in some instances, contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the

article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation, when understood affirmatively, and in which the negative or exclusive sense is to be so used as to defeat some of the great objects of the article. To this construction the court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion, — limitations which in no degree affect the decision in that case, or the tenor of its reasoning. The counsel who closed the argument put several cases for the purpose of illustration, which he supposed to arise under the Constitution, and yet to be apparently without the jurisdiction of the court. Were a State to lay a duty on exports, to collect the money, and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such State to recover back the money? Perhaps not. Without, however, deciding such supposed case, we may say that it is entirely unlike that under consideration.

§ 1718. "The citizen who had paid his money to his State under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the Constitution than to refuse to comply with any other; and, as the federal courts never had jurisdiction over contracts between a State and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the Constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under the Constitution, and would be the very case now before the court.

§ 1719. "We are also asked, if a State should confiscate property secured by a treaty, whether the individual could maintain an action for that property? If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land which is

secured by a treaty, and afterwards confiscated by a State, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the State for money which is not secured to him.

§ 1720. "The case of a State which pays off its own debts with paper-money no more resembles this than do those to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal courts have no cognizance of the case. But suppose a State to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a State to prosecute one of its citizens for refusing paper-money, who should plead the Constitution in bar of such prosecution? If his plea should be overruled, and judgment rendered against him, his case would resemble this; and, unless the jurisdiction of this court might be exercised over it, the Constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases. It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

§ 1721. "To escape the operation of these comprehensive

words, the counsel for the defendant has mentioned instances in which the Constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is the grant by a State of a patent of nobility. The court, he says, cannot annul this grant. This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right, under such a law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import, ought to be given to this article. They do not show that there can be 'a case in law or equity' arising under the Constitution to which the judicial power does not extend. We think, then, that, as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the Constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party."¹

¹ Much reliance has occasionally been laid upon particular expressions of the Supreme Court, used incidentally in argument, to support the reasoning which is here so ably answered. The reasoning in *Marbury v. Madison* (1 Cranch, R. 174, 175, 176) has been cited, as especially in point. But the Supreme Court, in *Cohens v. Virginia* (6 Wheat. R. 399 to 402), explained it in a satisfactory manner. So, in other cases, it is said by the Supreme Court that "appellate jurisdiction is given to the Supreme Court in all cases where it has not original jurisdiction;" and that "it may be exercised [by the Supreme Court] in all other cases than those of which it has original cognizance." *Martin v. Hunter*, 1 Wheat. R. 337, 338. And again, "in those cases in which the original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form." *Osborn v. Bank of United States*, 9 Wheat. R. 820. Now, these expressions, if taken in connection with the context and the general scope of the argument in which they are to be found, are

§ 1722. The next inquiry is, whether the eleventh amendment to the Constitution has effected any change of the jurisdiction thus confided to the judicial power of the United States. And here again the most satisfactory answer which can be given will be found in the language of the same opinion.¹ After quoting the words of the amendment, which are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the States by citizens of another State, or by citizens or subjects of any foreign state," the opinion proceeds: "It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign state. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors.

perfectly accurate. It is only by detaching them from this connection that they are supposed to speak a language inconsistent with that in *Cohens v. Virginia* (6 Wheat. R. 392 to 399). The court, in each of the cases where the language above cited is used, were referring to those classes of cases in which original jurisdiction is given solely by the character of the *party*, i. e. a State, a foreign ambassador, or other public minister, or a consul. In such cases, if there would be no jurisdiction at all founded upon any other part of the constitutional delegation of judicial power, except that applicable to *parties*, the court held that the appellate jurisdiction would not attach. Why? Plainly because original jurisdiction only was given in such cases. But where the Constitution extended the appellate jurisdiction to a class of cases, embracing the particular suit without any reference to the point who were parties, there the same reasoning would not apply.

¹ *Cohens v. Virginia*, 6 Wheat. R. 406 to 412.

There was not much reason to fear that foreign or sister States would be creditors to any considerable amount; and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

§ 1723. "The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.

§ 1724. "The words of the amendment appear to the court to justify and require this construction. The judicial power is not 'to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, &c.'

§ 1725. "What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be "the lawful demand of one's right;" or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio, quod alicui debetur*.' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

§ 1726. "To commence a suit is to demand something by the institution of process in a court of justice, and to prosecute the suit is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some

claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the Supreme Court against some of the States before this amendment was introduced into Congress, and others might be commenced before it should be adopted by the State legislatures, and might be depending at the time of its adoption. The object of the amendment was, not only to prevent the commencement of future suits but to arrest the prosecution of those which might be commenced when this article should form a part of the Constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a State by the citizen of another State. If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State.

§ 1727. "A writ of error is defined to be a commission, by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error the plaintiff may recover, or be restored to any thing, it may be released by the name of an action. In Bacon's Abridgment, tit. *Error*, L., it is laid down that 'where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea. And when land is to be recovered or restored in a writ of error, a release of actions real is a good bar. But where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar.' And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its

operation is entirely defensive. This rule will apply to writs of error from the courts of the United States as well as to those writs in England.

§ 1728. "Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it, of any description, is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point, and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given, rather than an appeal, because it is the more usual mode of removing suits at common law, and because, perhaps, it is more technically proper, where a single point of law and not the whole case is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant. He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union.

§ 1729. "The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit,

nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance; but the judgment is to be re-examined, and reversed, or affirmed, in like manner as if the party had appeared and argued his cause.

§ 1730. "The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined and affirmed, or reversed. It has never been suggested that such writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court. It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a State court into this court for the purpose of re-examining the question whether that judgment be in violation of the Constitution and laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of the thing which he demands."¹

§ 1731. Another inquiry touching the appellate jurisdiction of the Supreme Court, of a still more general character, is, whether it extends only to the inferior courts of the Union constituted by Congress, or reaches to cases decided in the State courts. This question has been made on several occasions, and has been most deliberately weighed and solemnly decided in the Supreme Court. The reasoning of the court in *Martin v. Hunter*² (which was the first time in which the question was directly presented for judgment) will be here given, as it has been affirmed on more recent discussions.³

¹ See also *Governor of Georgia v. Madrazo*, 1 Peters's Sup. R. 128 to 131, per Johnson, J.

² 1 Wheat. R. 304.

³ *Cohens v. Virginia*, 6 Wheat. R. 413 to 423.

§ 1732. "This leads us," says the court, "to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen, that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all these cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

§ 1733. "As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power [which includes appellate power] shall extend to *all cases*,' &c., and 'in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.' It is the *case*, then, and not the *court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

§ 1734. "If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclu-

sive of State tribunals. How, otherwise, could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction, as to them, should exist, then the appellate power would not extend to *all*, but to *some*, cases. If State tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution, without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this, not only when the *casus fæderis* should arise directly, but when it should arise incidentally in cases pending in State courts. This construction would abridge the jurisdiction of such courts far more than has been ever contemplated in any act of Congress.

§ 1735. "On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the State courts. Under such circumstances, it must be held that the appellate power would extend to State courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

§ 1736. "But it is plain, that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the State courts in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges, in every State, shall be bound thereby, anything in the

Constitution or laws of any State to the contrary notwithstanding.' It is obvious that this obligation is imperative upon the State judges in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the Constitution, laws, and treaties of the United States, — 'the supreme law of the land.'

§ 1737. "A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the State courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up, in his defence, a tender under a State law making paper-money a good tender, or a State law impairing the obligation of such contract, which law, if binding, would defeat the suit. The Constitution of the United States has declared that no State shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the State court proceed to hear and determine it? Can a mere plea in defence be, of itself, a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a State court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the State, must not the State court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the State courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect; and public mischiefs, of a most enormous magnitude, would inevitably ensue.

§ 1738. "It must, therefore, be conceded, that the Constitution not only contemplated but meant to provide for cases within the scope of the judicial power of the United States which might yet depend before State tribunals. It was foreseen, that, in the exercise of their ordinary jurisdiction, State courts would, incidentally, take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction, if that has already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow, that the appellate power of the United States must, in such cases, extend to State tribunals; and, if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution. It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius of our governments, and the spirit of the Constitution; that the latter was never designed to act upon State sovereignties, but only upon the people; and that, if the power exists, it will materially impair the sovereignty of the States and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

§ 1739. "It is a mistake that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When,

therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States, it is certainly difficult to support the argument, that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States; and, if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

§ 1740. "Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force than for giving it to the acts of the other co-ordinate departments of State sovereignty. The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things the absolute right of decision, in the last resort, must rest somewhere. Wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

§ 1741. "It has been further argued against the existence of this appellate power that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to State rights and State jealousies, a power was given to Congress to establish 'courts for revising and determining, finally,

appeals in all cases of captures.' It is remarkable that no power was given to entertain *original* jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of State tribunals. This was, undoubtedly, so far a surrender of State sovereignty. But it never was supposed to be a power fraught with public danger or destructive of the independence of State judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromised, and our national peace be endangered. Under the present Constitution, the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of State courts, if they should assert jurisdiction over prize causes, cannot be less important or less useful than it was under the confederation. In this connection we are led again to the construction of the words of the Constitution, 'the judicial power shall extend,' &c. If, as has been contended at the bar, the term 'extend' has a relative signification, and means to widen an existing power, it will then follow, that as the confederation gave an appellate power over State tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

§ 1742. "It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because State judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the State courts to the courts of the United States at any time before final judgment, though not after final judgment. As to the first reason,—admitting that the judges of the State courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given and withheld powers according to the judgment of the American people, by whom it was adopted. We can only con-

strue its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners; and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned why some, at least, of these cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases,—the cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors and other public ministers; and cases of admiralty and maritime jurisdiction,—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

§ 1743. "This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of *uniformity* of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs which would attend such a state of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact, and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

§ 1744. "There is an additional consideration which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It is not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants, who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that, as the plaintiff may always elect the State courts, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights. To obviate this difficulty, we are referred to the power which, it is admitted, Congress possess to remove suits from State courts to the national courts, (a) and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

§ 1745. "This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. (b) The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as in civil cases; and it is exercised before as well as after judgment. But this is always deemed, in both cases, an exercise of appellate and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that

(a) See *Tennessee v. Davis*, 100 U. S. 257; *Gaines v. Fuentes*, 92 U. S. 10; *Home Ins. Co. v. Morse*, 20 Wall. 445; *Home Life Ins. Co. v. Dunn*, 19 Wall. 214. A State statute obstructing this power entirely is unconstitutional. *Home Ins. Co. v. Morse*, 20 Wall. 445; *Doyle v. Continental Ins. Co.*, 94 U. S. 535. But the statute will not be unconstitutional merely because it imposes terms or condi-

tions as to the exercise of the right of removal. *Ib.*; *Paul v. Virginia*, 8 Wall. 168; *Lafayette Insurance Co. v. French*, 18 How. 404; *Bank of Augusta v. Earle*, 13 Peters, 519. What may have been the motive of the legislature is immaterial. *Doyle v. Continental Ins. Co.*, *supra*.

(b) But as to this see *Railroad Co. v. Whitton*, 13 Wall. 287; *Dennistoun v. Draper*, 5 Blatch. 340.

power; and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from State courts exist before judgment, because it is included in the appellate power, it must for the same reason exist after judgment. And if the appellate power, by the Constitution, does not include cases pending in State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment as after; and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals.

§ 1746. "The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties and not upon the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would in many cases be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the State decisions would be paramount to the Constitution. And though in civil suits the courts of the United States might act upon the parties, yet the State courts might act in the same way, and this conflict of jurisdictions would not only jeopard private rights but bring into imminent peril the public interests. On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the State courts, and that the twenty-fifth section of the judiciary act, which authorizes the exercise of

this jurisdiction in the specified cases by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power, and we dare not interpose a limitation where the people have not been disposed to create one.

§ 1747. "Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed as it was not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important States in the Union; and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court, through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."¹

¹ The same subject is most elaborately considered in *Cohens v. Virginia* (6 Wheat. R. 413 to 423), from which the following extract is taken. After adverting to the nature of the national government, and its powers and capacities, Mr. Chief Justice Marshall proceeds as follows: "In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the Constitution or to the law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal, enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution?"

"We think it is not. We think that in a government, acknowledgedly supreme with respect to objects of vital interest to the nation, there is nothing inconsistent with

§ 1748. Another inquiry is, whether the judicial power of the United States in any cases, and if in any, in what cases, is exclusive in the courts of the United States, or may be made exclusive

sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals, which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

“The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the State tribunals. If the federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States; and if a case of this description, brought in a State court, cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the State courts, however they may be constituted. ‘Thirteen independent courts,’ says a very celebrated statesman (and we have now more than twenty such courts), ‘of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.’

“Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity as well as correctness in expounding the Constitution and laws of the United States would itself suggest the propriety of vesting in some single tribunal the power of deciding in the last resort all cases in which they are involved.

“We are not restrained, then, by the political relation between the general and State governments from construing the words of the Constitution, defining their judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

“They give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws.

“The framers of the Constitution would naturally examine the state of things existing at the time, and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation, by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise. They inform us, themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect Union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

“Previous to the adoption of the confederation, Congress established courts which received appeals in prize causes decided in the courts of the respective States. This power of the government to establish tribunals for these appeals was thought consistent with, and was founded on, its political relations with the States. These courts did

at the election of Congress. The subject was much discussed in the case of *Martin v. Hunter*.¹ On that occasion the court said :²

exercise appellate jurisdiction over those cases decided in the State courts to which the judicial power of the federal government extended.

"The confederation gave to Congress the power 'of establishing courts for receiving and determining, finally, appeals in all cases of captures.'

"This power was uniformly construed to authorize those courts to receive appeals from the sentences of State courts, and to affirm or reverse them. State tribunals are not mentioned ; but this clause in the confederation necessarily comprises them. Yet the relation between the general and State governments was much weaker, much more lax, under the confederation than under the present Constitution ; and the States being much more completely sovereign, their institutions were much more independent.

"The convention which framed the Constitution, on turning their attention to the judicial power, found it limited to a few objects, but exercised with respect to some of those objects, in its appellate form, over the judgments of the State courts. They extend it, among other objects, to all cases arising under the Constitution, laws, and treaties of the United States ; and in a subsequent clause declare that in such cases the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State court on the Constitution, laws, or treaties of the United States, from this appellate jurisdiction.

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

"The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank ; and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it.

"In discussing the extent of the judicial power, the *Federalist* (No 82) says : 'Here another question occurs : what relation would subsist between the national and State courts in these instances of concurrent jurisdiction ? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone to be contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff

¹ 1 Wheat. R. 304, 333.

² Ibid. See also *Ex parte Cabrera*, 1 Wash. Cir. C. R. 232.

"It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls; and cases of admiralty and maritime jurisdiction. In this class the expression is, that the judicial power shall extend to *all cases*. But in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word '*all*' is dropped, seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology perhaps a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well

or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as *one whole*. The courts of the latter will, of course, be natural auxiliaries to the execution of the laws of the Union; and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of natural justice and the rules of national decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the Supreme Court to appeals from the subordinate federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.'

"A contemporaneous exposition of the Constitution, certainly of not less authority than that which has been just cited, is the Judiciary Act itself. We know that in the Congress which passed that act were many eminent members of the convention which formed the Constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State courts in the cases therein specified to be unauthorized by the Constitution." The twenty-fifth section of the Judiciary Act of 1789, ch. 20, here alluded to, as contemporaneous construction of the Constitution, is wholly founded upon the doctrine that the appellate jurisdiction of the Supreme Court may constitutionally extend over causes in State courts. See also 1 Kent's Comm. Lect. 15; Rawle on Const. ch. 28; Sergeant on Const. ch. 7. (a)

(a) Cook v. Moffat, 5 How. 295.

have been the intention of the framers of the Constitution imperatively to extend the judicial power, either in an original or appellate form, to *all cases*; and, in the latter class, to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

§ 1749. "The vital importance of all the cases enumerated in the first class to the national sovereignty might warrant such a distinction. In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the State courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the State courts previous to the adoption of the Constitution. And it could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations. And as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

§ 1750. "A different policy might well be adopted in reference to the second class of cases; for although it might be fit that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States, as defendants in their own courts. It might not have been deemed

proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs. And as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might in their wisdom choose to apply. It is also worthy of remark that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases the jurisdiction is not limited, except by the subject-matter; in the second, it is made materially to depend upon the value in controversy.

§ 1751. "We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavored to be illustrated. It has the rather been brought into view in deference to the legislative opinion which has so long acted upon and enforced this distinction. But there is, certainly, vast weight in the argument which has been urged, that the Constitution is imperative upon Congress to vest all the judicial power of the United States in the shape of original jurisdiction in the supreme and inferior courts, created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all State authority, and in all others may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the judicial act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial power of the United States extended they might rightfully vest exclusive jurisdiction in their own courts." (a)

§ 1752. The Federalist has spoken upon the same subject in the following terms: "The only thing in the proposed Constitution which wears the appearance of confining the causes of federal cognizance to the federal courts is contained in this passage: 'The *judicial power* of the United States *shall be vested* in one Supreme

(a) See *Waring v. Clarke*, 5 How. 441.

Court, and in *such* inferior courts as the Congress shall from time to time ordain and establish.' This might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend, or simply to denote that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals; and as the first would amount to an alienation of State power by implication, the last appears to me the most defensible construction.

§ 1753. "But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts had previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases can hardly be considered as the abridgment of a pre-existing authority. I mean not, therefore, to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction further than may relate to an appeal. And I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When, in addition to this, we consider the State governments and the national governments, as they truly are, in the light of kindred

systems, and as parts of *one whole*, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited."¹

§ 1754. It would be difficult, and perhaps not desirable, to lay down any general rules in relation to the cases in which the judicial power of the courts of the United States is exclusive of the State courts, or in which it may be made so by Congress, until they shall be settled by some positive adjudication of the Supreme Court. That there are some cases in which that power is exclusive, cannot well be doubted; that there are others, in which it may be made so by Congress, admits of as little doubt; and that in other cases it is concurrent in the State courts, at least until Congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied.² It seems to be admitted, that the jurisdiction of the courts of the United States is, or at least may be, made exclusive in all cases arising under the Constitution, laws, and treaties of the United States;³ in all cases affecting ambassadors, other public ministers, and consuls;⁴ in all cases (*in their character exclusive*) of admiralty and maritime jurisdiction;⁵ (a) in controversies to which the United States shall be a party; in controversies between two or more States; in controversies between a State and citizens of another State; and in controversies between a State and foreign states, citizens, or subjects.⁶ And it is only in those cases where, previous to the

¹ See *The Federalist*, No. 82; *Id.* 81.

² See *Cohens v. Virginia*, 6 Wheat. R. 396, 397; 2 *Elliot's Debates*, 380, 381. See 11 Wheat. R. 472, note; *Rawle on Const.* ch. 21; 1 *Kent's Comm. Lect.* 18, p. 370, &c. (2d edit. 395, &c.); 1 *Tuck. Black. Comm. App.* 181, 182, 183; *Governor of Georgia v. Madrazo*, 1 *Peters s Sup. C. R.* 128, 129, per *Johnson, J.*

³ *Cohens v. Virginia*, 6 Wheat. R. 396, 397; *Houston v. Moore*, 5 Wheat. R. 25 to 28; *Id.* 69, 71; *Slocum v. Maybury*, 2 Wheat. R. 1; *Hoyt v. Gelston*, 3 Wheat. R. 246, 311.

⁴ *The Federalist*, No. 82; *Martin v. Hunter*, 1 Wheat. R. 336, 337; *ante*, § 1672, note 1.

⁵ See 2 *Elliot's Debates*, 380; *Cohens v. Virginia*, 6 Wheat. R. 396, 397; *Martin v. Hunter*, 1 Wheat. R. 337, 373; *Houston v. Moore*, 5 Wheat. R. 49; *United States v. Bevans*, 3 Wheat. R. 387; *ante*, § 1671; *Ogden v. Saunders*, 12 Wheat. R. 278, *Johnson, J.*; *Janney v. Columbian Ins. Co.*, 10 Wheat. R. 418.

⁶ See 1 *Tuck. Black. Comm. App.* 181, 182, 183; 1 *Kent's Comm. Lect.* 18, p. 370, &c. (2d edition, pp. 395 to 404).

(a) See *The Moses Taylor*, 4 Wall. Belfast, 7 Wall. 624; *Leon v. Galceran*, 411; *The Hine v. Trevor*, *Id.* 555; *The* 11 Wall. 185.

Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.¹ Congress, indeed, in the Judiciary Act of 1789 (ch. 20, §§ 9, 11, 13), have manifestly legislated upon the supposition, that, in all cases to which the judicial power of the United States extends, they might rightfully vest exclusive jurisdiction in their own courts.²

§ 1755. It is a far more difficult point to affirm the right of Congress to vest in any State court any part of the judicial power confided by the Constitution to the national government. Congress may, indeed, permit the State courts to exercise a concurrent jurisdiction in many cases; but those courts then derive no authority from Congress over the subject-matter, but are simply left to the exercise of such jurisdiction as is conferred on them by the State constitution and laws. There are, indeed, many acts of Congress which permit jurisdiction over the offences therein described to be exercised by State magistrates and courts; but this, it has been said by a learned judge,³ is not because such permission was considered to be necessary, under the Constitution, to vest a concurrent jurisdiction in those tribunals, but because the jurisdiction was exclusively vested in the national courts by the judiciary act, and consequently could not be otherwise executed by the State courts. But, he has added, "For I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States; although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not pro-

¹ *Martin v. Hunter*, 1 Wheat. R. 336, 337; *The Federalist*, Nos. 27, 82; *Houston v. Moore*, 5 Wheat. R. 49.

² *Ibid.* See 1 Peters's Sup. Ct. R. 128, 129, 130, per Johnson, J.; *Ex parte Cabrera*, 1 Wash. Cir. R. 232. It would seem, upon the common principles of the laws of nations, as ships of war of a government are deemed to be under the exclusive dominion and sovereignty of their own government, wherever they may be, and thus enjoy an extra-territorial immunity, that crimes committed on board of ships of war of the United States, in port as well as at sea, are exclusively cognizable and punishable by the United States. This very point arose in *United States v. Bevens* (3 Wheat. R. 336, 388); but it was not decided. The result of that trial, however, showed the general opinion that the State courts had no jurisdiction, as the law officers of the State declined to interfere after the decision in the Supreme Court of the United States.

³ Mr. Justice Washington, in *Houston v. Moore*, 5 Wheat. R. 27, 28; *The Federalist*, No. 27; *Id.* No. 82.

hibited by the exclusive jurisdiction of the federal courts." This latter doctrine was positively affirmed by the Supreme Court in *Martin v. Hunter*; ¹ and indeed seems, upon general principles, indisputable. In that case, the court said, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." ²

§ 1756. In regard to jurisdiction over crimes committed against the authority of the United States, it has been held, that no part of this jurisdiction can, consistently with the Constitution, be delegated to State tribunals.³ It is true, that Congress has, in various acts, conferred the right to prosecute for offences, penalties, and forfeitures, in the State courts. But the latter have, in many instances, declined the jurisdiction, and asserted its unconstitutionality. And certainly there is, at the present time, a decided preponderance of judicial authority in the State courts against the authority of Congress to confer the power.⁴

§ 1757. In the exercise of the jurisdiction confided respectively to the State courts, and those courts of the United States (where the latter have not appellate jurisdiction), it is plain that neither can have any right to interfere with or control the operations of the other. It has accordingly been settled, that no State court

¹ 1 Wheat. R. 330. See 1 Kent's Comm. Lect. 18, p. 375 (2d edit. p. 400).

² Ibid. See also *Houston v. Moore*, 5 Wheat. R. 68, 69. See 1 Kent's Comm. Lect. 18, p. 375, &c. (2d edit. pp. 400 to 404). The *Federalist* (No. 81) seems faintly to contend that Congress might vest the jurisdiction in the State courts: "To confer upon the existing courts of the several States the power of determining such causes, would, *perhaps*, be as much to 'constitute tribunals' as to create new courts with the like power." But how is this reconcilable with the context of the Constitution? "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior," &c. Are not these judges of the inferior courts the same in whom the jurisdiction is to be vested? Who are to appoint them? Who are to pay their salaries? Can their compensation be diminished? All these questions must be answered with reference to the same judges, that is, with reference to judges of the supreme and inferior courts of the United States, and not of State courts. See also The *Federalist*, No. 45.

³ *Martin v. Hunter*, 1 Wheat. R. 337; *Houston v. Moore*, 5 Wheat. R. 35, 69, 71, 74, 75.

⁴ See Sergeant on Const. Law. ch. 27 (ch. 28); *United States v. Campbell*, 6 Hall's Law Journ. 113; *United States v. Lathrop*, 17 Johns. R. 5; *Coruth v. Freely*, Virginia Cases, 321; *Ely v. Peck*, 7 Connecticut R. 239; 1 Kent's Comm. Lect. 18, p. 370, &c. (2d edit. pp. 395 to 404). But see 1 Tuck. Black. Comm. App. 181, 182; Rawle on Const. ch. 21.

can issue an injunction upon any judgment in a court of the United States; the latter having an exclusive authority over its own judgments and proceedings.¹ (a) Nor can any State court, or any State legislature, annul the judgments of the courts of the United States, or destroy the rights acquired under them;² (b) nor in any manner deprive the Supreme Court of its appellate jurisdiction;³ nor in any manner interfere with or control the process (whether mesne or final) of the courts of the United States;⁴ nor prescribe the rules or forms of proceeding, nor effect of process, in the courts of the United States;⁵ nor issue a mandamus to an officer of the United States to compel him to perform duties devolved on him by the laws of the United States.⁶ And although writs of *habeas corpus* have been issued by State judges and State courts in cases where the party has been in custody under the authority of process of the courts of the United States, there has been considerable diversity of opinion whether such an exercise of authority is constitutional; and it yet remains to be decided whether it can be maintained.⁷ (c)

§ 1758. Indeed, in all cases where the judicial power of the United States is to be exercised, it is for Congress alone to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode in which the judgments consequent thereon shall be executed. No State legislature or State court can have the slightest right to interfere; and

¹ *McKim v. Voorhis*, 7 Cranch's R. 279; 1 Kent's Comm. Lect. 19, pp. 382 to 387 (2d edit. pp. 409 to 412).

² *United States v. Peters*, 5 Cranch, 115; 1 Kent's Comm. Lect. 19, p. 382, &c. (2d edit. p. 409, &c.).

³ *Wilson v. Mason*, 1 Cranch, 94; 1 Kent's Comm. Lect. 19, p. 382 (2d edit. p. 409).

⁴ *United States v. Wilson*, 8 Wheat. R. 253.

⁵ *Wayman v. Southard*, 10 Wheat. R. 1, 21, 22; *Bank of the United States v. Halsted*, 10 Wheat. R. 51.

⁶ *McClung v. Silliman*, 6 Wheat. R. 598.

⁷ See Sergeant on Const. Law, ch. 27 (ch. 28); 1 Kent's Comm. Lect. 18, p. 375 (2d edit. p. 400). See 1 Tuck. Black. Comm. App. 291, 292.

(a) See *Wallace v. McConnell*, 13 Pet. 136; *Ableman v. Booth*, 21 How. 506.

(b) See *Duncan v. Darst*, 17 Pet. 204, and 1 How. 301.

(c) In *Ableman v. Booth*, 21 How. 506, it was decided that although the process might issue, yet when by the return it was shown that the petitioner was

held under national authority, the State court could proceed no further, but must leave the validity of the authority detaining the petitioner to be passed upon by the federal judiciary. This decision was affirmed in *Tarble's Case*, 13 Wall. 397, Chief Justice Chase dissenting.

Congress are not even capable of delegating the right to them. They may authorize national courts to make general rules and orders for the purpose of a more convenient exercise of their jurisdiction; but they cannot delegate to any State authority any control over the national courts.¹

§ 1759. On the other hand, the national courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in the State courts,² or in any other manner to interfere with their jurisdiction or proceedings.³ (a)

§ 1760. Having disposed of these points, we may again recur to the language of the Constitution, for the purpose of some further illustrations. The language is, that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

§ 1761. In the first place, it may not be without use to ascertain what is here meant by appellate jurisdiction, and what is the mode in which it may be exercised. The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.⁴ In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form which the legislature may choose to prescribe;⁵ but still, the substance

¹ *Wayman v. Southard*, 10 Wheat. R. 1; *Palmer v. Allen*, 7 Cranch, R. 550; *Gibbons v. Ogden*, 9 Wheat. R. 207, 208; *Bank of the United States v. Halsted*, 10 Wheat. R. 51.

² *Diggs v. Wolcott*, 4 Cranch, 178. See 1 Kent's Comm. Lect. 15, p. 301 (2d edit. p. 321).

³ *Ex parte Cabrera*, 1 Wash. Cir. R. 232; 1 Kent's Comm. Lect. 19, p. 386 (2d edit. pp. 411, 412).

⁴ *Marbury v. Madison*, 1 Cranch, R. 175, 176; *The Federalist*, No. 81; *Weston v. City Council of Charleston*, 2 Peters's Sup. Ct. R. 449.

⁵ *Ibid.*

(a) *Buck v. Colbath*, 3 Wall. 534. See *City Bank v. Skelton*, 2 Blatchf. 26. Where the State and federal courts have concurrent jurisdiction, the court which first has possession of the subject by

commencement of suit must adjudicate. *Smith v. McIvor*, 9 Wheat. 532; *Wallace v. McConnell*, 13 Pet. 136; *Mallett v. Dexter*, 1 Curt. C. C. 178.

must exist before the form can be applied to it. To operate at all, then, under the Constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity. A power, therefore, conferred by Congress on the Supreme Court to issue a *mandamus* to public officers of the United States generally, is not warranted by the Constitution; for it is in effect, under such circumstances, an exercise of original jurisdiction.¹ But where the object is to revise a judicial proceeding, the mode is wholly immaterial; and a writ of *habeas corpus*, or *mandamus*, a writ of error or an appeal, may be used, as the legislature may prescribe.²

§ 1762. The most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil-law origin, and removes a cause, entirely subjecting the fact as well as the law to a review and a retrial. A writ of error is a process of common-law origin, and it removes nothing for re-examination but the law.³ The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter in suits at common law tried by a jury.

§ 1763. It is observable, that the language of the Constitution is, that "the Supreme Court shall have appellate jurisdiction, *both as to law and fact*." This provision was a subject of no small alarm and misconstruction at the time of the adoption of the Constitution, as it was supposed to confer on the Supreme Court, in the exercise of its appellate jurisdiction, the power to review the decision of a jury in mere matters of fact, and thus, in effect, to destroy the validity of their verdict, and to reduce to a mere form the right of a trial by jury in civil cases. The objection was at once seized hold of by the enemies of the Constitution; and it was pressed with an urgency and zeal which were well-nigh preventing its ratification.⁴ There is certainly some foundation in

¹ *Marbury v. Madison*, 1 Cranch, R. 175, 176; *The Federalist*, No. 81; *Weston v. City Council of Charleston*, 2 Peters's Sup. Ct. R. 449.

² *Ibid.*; *United States v. Hamilton*, 3 Dall. 17; *Ex parte Bollman*, 4 Cranch, R. 75; *Ex parte Kearney*, 7 Wheat. R. 38; *Ex parte Crane*, 5 Peters's Sup. Ct. R. 190.

³ *Wiscart v. Dauchy*, 3 Dall. R. 321; *Cohens v. Virginia*, 9 Wheat. R. 409 to 412.

⁴ See 1 Elliot's Debates, 121, 122; 2 Elliot's Debates, 346, 380 to 410; *Id.* 413

the ambiguity of the language to justify an interpretation that such a review might constitutionally be within the reach of the appellate power, if Congress should choose to carry it to that extreme latitude.¹ But, practically speaking, there was not the slightest danger that Congress would ever adopt such a course, even if it were within their constitutional authority; since it would be at variance with all the habits, feelings, and institutions of the whole country. At least it might be affirmed, that Congress would scarcely take such a step until the people were prepared to surrender all the great securities of their civil as well as of their political rights and liberties; and, in such an event, the retaining of the trial by jury would be a mere mockery. The real object of the provision was to retain the power of reviewing the fact as well as the law, in cases of equity and admiralty and maritime jurisdiction.² And the manner in which it is expressed was probably occasioned by the desire to avoid the introduction of the subject of a trial by jury in civil cases, upon which the convention were greatly divided in opinion.

§ 1764. The Federalist met the objection, pressed with much earnestness and zeal, in the following manner: "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it, as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term 'appellate,' which in our law parlance is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There, an appeal from one jury to another is familiar both in language and practice, and is even a matter of course until there have been two verdicts on one side. The word 'appellate,' therefore, will not be understood in the same sense in

to 427; 3 Elliot's Debates, 139 to 157; 2 Amer. Museum, 425; Id. 534; Id. 540, 548, 553; 3 Amer. Museum, 419, 420; 1 Tuck. Black. Comm. App. 351.

¹ 2 Elliot's Debates, 318, 347, 419; 3 Elliot's Debates, 140, 149; Rawle on Const. ch. 10, p. 135.

² 3 Elliot's Debates, 283.

New England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of a particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law, or fact, or both. The mode of doing it may depend on ancient custom, or legislative provision; in a new government it must depend on the latter, and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

§ 1765. "But it does not follow that the re-examination of a fact, once ascertained by a jury, will be permitted in the Supreme Court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true, it cannot institute a new inquiry concerning the fact, but it takes cognizance of it, as it appears upon the record, and pronounces the law arising upon it. This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common-law courts of this State ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly, when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

§ 1766. "The following train of ideas may well be imagined to have influenced the convention in relation to this particular provision. The appellate jurisdiction of the Supreme Court, it may have been argued, will extend to causes determinable in different modes, some in the course of the *common law*, others in the course of the *civil law*. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might

be essential to the preservation of the public peace. It is, therefore, necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States *all causes* are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

§ 1767. "This view of the matter at any rate puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial."¹

§ 1768. These views, however reasonable they may seem to considerate minds, did not wholly satisfy the popular opinion; and as the objection had a vast influence upon public opinion, and amendments were proposed by various State conventions on this subject, Congress at its first session, under the guidance of the friends of the Constitution, proposed an amendment, which was ratified by the people, and is now incorporated into the Constitution. It is in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. (a) And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." This amendment completely struck down the objection, and has secured the

¹ The Federalist, No. 81. See also The Federalist, No. 83.

(a) This does not apply to the State courts. *Edwards v. Elliott*, 21 Wall. 532.

right of a trial by jury in civil cases in the fullest latitude of the common law.¹ (a) Like the other amendments proposed by the same Congress, it was coldly received by the enemies of the Constitution, and was either disapproved by them or drew from them a reluctant acquiescence.² It weakened the opposition by taking away one of the strongest points of attack upon the Constitution. Still, it is a most important and valuable amendment, and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases,—a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.³

¹ See 1 Tuck. Black. Comm. App. 351 ; Rawle on Const. ch. 10, p. 135 ; Bank of Hamilton v. Dudley, 2 Peters's R. 492, 525.

² 5 Marshall's Life of Washington, ch. 3, pp. 209, 210.

³ It is due to the excellent statesmen who framed the Constitution, to give their reasons for the omission of any provision in the Constitution securing the trial by jury in civil cases. They were not insensible to its value ; but the diversity of the institutions of different States on this subject compelled them to acquiesce in leaving it entirely to the sound discretion of Congress. The Federalist, No. 83, has given an elaborate paper to the subject, which is transcribed at large as a monument of admirable reasoning and exalted patriotism.

"The objection to the plan of the convention, which has met with most success in this State, is relative to *the want of a constitutional provision* for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated, has been repeatedly adverted to and exposed, but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the Constitution in regard to *civil causes* is represented as an abolition of the trial by jury ; and the declamations to which it has afforded a pretext are artfully calculated to induce a persuasion that this pretended abolition is complete and universal, extending not only to every species of civil but even to *criminal causes*. To argue with respect to the latter would be as vain and fruitless as to attempt to demonstrate any of those propositions which, by their own internal evidence, force conviction, when expressed in language adapted to convey their meaning.

"With regard to civil causes, subtleties, almost too contemptible for refutation, have been employed to countenance the surmise that a thing which is only *not provided for* is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But, as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

"The maxims on which they rely are of this nature : 'A specification of particulars is an exclusion of generals ;' or, 'The expression of one thing is the exclusion of another.' Hence, say they, as the Constitution has established the trial by jury

(a) See Parsons v. Bedford, 3 Pet. 447. the State courts. The Justices v. Murray, 9 Wall. 274. This provision is applicable to cases brought into the Supreme Court from

§ 1769. Upon a very recent occasion the true interpretation and extent of this amendment came before the Supreme Court for in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury, in regard to the latter.

“The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them, is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common sense to suppose that a provision obliging the legislative power to commit the trial of criminal causes to juries is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.

“A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion in regard to criminal causes is abridged by an express injunction; but it is left at large in relation to civil causes, for the very reason that there is a total silence on the subject. The specification of an obligation to try all criminal causes in a particular mode excludes indeed the obligation of employing the same mode in civil causes, but does not abridge the power of the legislature to appoint that mode, if it should be thought proper. The pretence, therefore, that the national legislature would not be at liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretence destitute of all foundation.

“From these observations this conclusion results, that the trial by jury in civil cases would not be abolished; and that the use attempted to be made of the maxims which have been quoted is contrary to reason, and therefore inadmissible. Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

“Having now seen that the maxims relied upon will not bear the use made of them, let us endeavor to ascertain their proper application. This will be best done by examples. The plan of the convention declares that the power of Congress, or, in other words, of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.

“In like manner, the authority of the federal judicature is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction; because, the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority.

“These examples are sufficient to elucidate the maxims which have been mentioned, and to designate the manner in which they should be used.

“From what has been said, it must appear unquestionably true, that trial by jury

decision, in a case from Louisiana, where the question was, whether the Supreme Court could entertain a motion for a new trial, and

is in no case abolished by the proposed Constitution ; and it is equally true that in those controversies between individuals, in which the great body of the people are likely to be interested, that institution will remain precisely in the situation in which it is placed by the State constitutions. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable, as heretofore, by the State courts only, and in the manner which the State constitutions and laws prescribe. All land causes, except where claims under the grants of different States come into question, and all other controversies between the citizens of the same State, unless where they depend upon positive violations of the articles of Union by acts of the State legislatures, will belong exclusively to the jurisdiction of the State tribunals. Add to this that admiralty causes, and almost all those which are of equity jurisdiction, are determinable under our own government without the intervention of a jury, and the inference from the whole will be, that this institution, as it exists with us at present, cannot possibly be affected to any great extent by the proposed alteration in our system of government.

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury, or, if there is any difference between them, it consists in this : the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation ; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful, or essential in a representative republic, or how much more merit it may be entitled to as a defence against the oppressions of an hereditary monarch than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge, that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism ; and all these have relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

"It has been observed that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

"It is evident that it can have no influence upon the legislature, in regard to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers intrusted with the execution of the revenue laws.

"As to the mode of collection in this State under our own constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals would neither suit the exigencies of the public nor promote the convenience of the citizens. It would often

re-examine the facts tried by a jury, that being the practice under the local law, and there being an act of Congress authorizing the

occasion an accumulation of costs more burdensome than the original sum of the tax to be levied.

"And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases will afford the desired security. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion are offences against the government, for which the persons who commit them may be indicted and punished according to the circumstance of the case.

"The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favor is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and, acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may be fairly supposed that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass than in gaining men who had been chosen by the government for their probity and good character. But, making every deduction for these considerations, the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial; and it would be, in most cases, of little use to practise upon the jury, unless the court could be likewise gained. Here, then, is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes.

"Notwithstanding, therefore, the doubts I have expressed as to the *essentiality* of trial by jury in civil suits to liberty, I admit that it is, in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favor, if it were possible to fix with accuracy the limits within which it ought to be comprehended. This, however, is, in its own nature, an affair of much difficulty; and men not blinded by enthusiasm must be sensible that in a federal government, which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, the difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles which, we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

"The great difference between the limits of the jury trial in different States is not generally understood. And as it must have considerable influence on the sentence we

courts of the United States in Louisiana to adopt the local practice, with certain limitations. The Supreme Court held that no

ought to pass upon the omission complained of, in regard to this point, an explanation of it is necessary. In this State, our judicial establishments resemble more nearly than in any other those of Great Britain. We have courts of common law, courts of probates (analogous, in certain matters, to the spiritual courts in England), a court of admiralty, and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others, a single judge presides, and proceeds, in general, either according to the course of the canon or civil law, without the aid of a jury. In New Jersey there is a court of chancery, which proceeds like ours, but neither courts of admiralty nor of probates, in the sense in which these last are established with us. In that State the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probates, and, of course, the jury trial is more extensive in New Jersey than in New York. In Pennsylvania this is, perhaps, still more the case; for there is no court of chancery in that State, and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has, in these respects, imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those States which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common-law courts, and an appeal, of course, lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty, and, to a certain extent, equity jurisdiction. In cases of importance, their general assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in *practice* further than in any other State yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four eastern States, the trial by jury not only stands upon a broader foundation than in the other States, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal, *of course*, from one jury to another, till there has been two verdicts out of three on one side.

"From this sketch it appears that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and, secondly, that more, or at least as much, might have been hazarded by taking the system of any one State for a standard as by omitting a provision altogether, and leaving the matter, as has been done, to legislative regulation.

"The propositions which have been made for supplying the omission have rather served to illustrate than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose: 'Trial by jury shall be as heretofore;' and this, I maintain, would be inapplicable and indeterminate. The United States, in their collective capacity, are the object to which all general provisions in the Constitution must be understood to refer. Now, it is evident that,

authority was given by the act to re-examine the facts ; and if it had been, an opinion was intimated of the most serious doubts of

though trial by jury, with various limitations, is known in each State individually, yet in the United States, *as such*, it is, strictly speaking, unknown, because the present federal government has no judiciary power whatever ; and, consequently, there is no antecedent establishment to which the term 'heretofore' could properly relate. It would, therefore, be destitute of precise meaning, and inoperative from its uncertainty.

"As, on the one hand, the form of the provision would not fulfil the intent of its proposers, so, on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the State courts ; that is to say, admiralty causes should be tried in Connecticut by a jury, in New York without one. The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well-regulated judgment towards it. Whether the cause should be tried with or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

"But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in suits which concern the public peace with foreign nations ; that is, in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations ; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries. There would, of course, be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the true province of juries be to determine matters of fact, yet, in most cases, legal consequences are complicated with fact in such a manner as to render a separation impracticable.

"It will add great weight to this remark in relation to prize causes, to mention that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great Britain, in the last resort, before the king himself in his privy council, where the fact as well as the law undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the Constitution which would make the State systems a standard for the national government in the article under consideration, and the danger of encumbering the government with any constitutional provisions the propriety of which is not indisputable.

"My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction, and that the causes which belong to the former would be improperly committed to juries. The great and primary use of a court of equity is to give relief in *extraordinary cases*, which are *exceptions* to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination ; while a separation between the jurisdictions has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity are, in many instances, so nice and intricate, that they are incompatible

its constitutionality. On that occasion the court said: "The trial by jury is justly dear to the American people. It has always been

with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.

"It is true, that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence, — the model which has been followed in several of the States. But it is equally true, that the trial by jury has been unknown in every instance in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

"These appear to be conclusive reasons against incorporating the systems of all the States, in the formation of the national judiciary according to what may be conjectured to have been the intent of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

"It is in this form: 'In civil actions between citizens of different States, every issue of fact, arising in *actions at common law*, may be tried by a jury, if the parties, or either of them, request it.'

"This, at best, is a proposition confined to one description of causes; and the inference is fair, either that the Massachusetts convention considered that as the only class of federal causes in which the trial by jury would be proper, or that, if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object can never be considered as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

"But this is not all. If we advert to the observations already made respecting the courts that subsist in the several States of the Union, and the different powers exercised by them, it will appear that there are no expressions more vague and indeterminate than those which have been employed to characterize *that* species of causes which it is intended shall be entitled to a trial by jury. In this State, the boundaries between actions at common law and actions of equitable jurisdiction are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other States the boundaries are less precise. In some of them every cause is to be tried in a court of common law; and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties or either of them choose it. Hence, the same irregularity and confusion would be introduced by a compliance with this proposition that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one State a cause would receive its determination from a jury, if the parties or either of them requested it; but in another

an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such

State, a cause exactly similar to the other must be decided without the intervention of a jury, because the State tribunals varied as to common-law jurisdiction.

"It is obvious, therefore, that the Massachusetts proposition cannot operate, as a general regulation, until some uniform plan, with respect to the limits of common-law and equitable jurisdictions, shall be adopted by the different States. To devise a plan of that kind is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions.

"It may be asked, why could not a reference have been made to the Constitution of this State, taking that which is allowed by me to be a good one, as a standard for the United States? I answer, that it is not very probable the other States should entertain the same opinion of our institutions which we do ourselves. It is natural to suppose that they are more attached to their own, and that each would struggle for the preference. If the plan of taking one State as a model for the whole had been thought of in the convention, it is to be presumed that the adoption of it in that body would have been rendered difficult by the predilection of each representation in favor of its own government; and it must be uncertain which of the States would have been taken as the model. It has been shown that many of them would be improper ones. And I leave it to conjecture, whether, under all circumstances, it is most likely that New York or some other State would have been preferred. But admit that a judicious selection could have been effected in the convention, still there would have been great danger of jealousy and disgust in the other States at the partiality which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext for raising a host of local prejudices against it, which perhaps might have hazarded, in no inconsiderable degree, its final establishment.

"To avoid the embarrassments of a definition of the cases which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers that a provision might have been inserted for establishing it in all cases whatsoever. For this, I believe, no precedent is to be found in any member of the Union; and the considerations which have been stated in discussing the proposition of the minority of Pennsylvania must satisfy every sober mind that the establishment of the trial by jury in *all* cases would have been an unpardonable error in the plan.

"In short, the more it is considered, the more arduous will appear the task of fashioning a provision in such a form as not to express too little to answer the purpose or too much to be advisable, or which might not have opened other sources of opposition to the great and essential object of introducing a firm national government.

"I cannot but persuade myself, on the other hand, that the different lights in which the subject has been placed in the course of these observations will go far towards removing in candid minds the apprehensions they may have entertained on the point. They have tended to show that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that, even in far the greatest proportion of civil cases, those in which the great body of the community is interested, that mode of trial will remain in full force, as established in the State constitutions, untouched and unaffected by the plan of the convention; that it is in no case abolished by that plan; and that there are great, if not insurmountable, difficulties in the way

a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress, which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares,

of making any precise and proper provision for it in the Constitution for the United States.

"The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced that even in this State it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.

"This is now clearly understood to be the case in Great Britain, and it is equally so in the State of Connecticut. And yet it may be safely affirmed, that more numerous encroachments have been made upon the trial by jury in this State since the revolution, though provided for by a positive article of our Constitution, than has happened in the same time either in Connecticut or Great Britain. It may be added, that these encroachments have generally originated with the men who endeavor to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favorite career. The truth is, that the general genius of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them; and the want of them will never be, with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good government.

"It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a constitution which expressly establishes a trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular State in the Union, can boast of no constitutional provision for either." *The Federalist*, No. 83. See also 2 *Elliot's Debates*, 346, 380 to 410; *Id.* 413 to 427; 3 *Elliot's Debates*, 131, 132, 137, 141, 153; *Id.* 283, 284, 301, 302.

that, 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, once tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.' At this time there were no States in the Union the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no States were contemplated in which it would not exist. The phrase, 'common law,' found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence. The Constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *law and equity* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority,' &c., and 'to all cases of *admiralty and maritime jurisdiction*.'¹ It is well known, that in civil causes in courts of equity and admiralty juries do not intervene; and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law* they meant what the Constitution denominated in the third article 'law;' not merely suits which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined in contradistinction to those in which equitable rights alone were recognized and equitable remedies were administered; or in which, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Probably there were few, if any, States in the Union in which some new legal remedies differing from the old common-law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the

¹ *Ante*, §§ 1645, 1646.

peculiar form which they may assume to settle legal rights. And Congress seem to have acted with reference to this exposition in the judiciary act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment), for in the ninth section it is provided, that 'the trial of issues in fact in the *district courts* in all causes, except civil causes of *admiralty* and *maritime jurisdiction*, shall be by jury;' and in the twelfth section it is provided, that 'the trial of issues in fact in the *circuit courts* shall, in all suits except those of *equity* and of *admiralty* and *maritime jurisdiction*, be by jury.' And again, in the thirteenth section, it is provided that 'the trial of issues of fact in the *Supreme Court*, in all actions at law against citizens of the United States, shall be by jury.'

§ 1770. "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, § 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (§§ 22, 24) to this court to redress errors of law, and, for such errors, to award a new trial in suits at law which have been tried by a jury.

§ 1771. "Was it the intention of Congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury? to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other States in the Union? We think not. No general words, purporting only to regulate the practice

of a particular court to conform its modes of proceeding to those prescribed by the State to its own courts, ought, in our judgment, to receive an interpretation which would create so important an alteration in the laws of the United States securing the trial by jury. Especially ought it not to receive such an interpretation when there is a power given to the inferior court itself to prevent any discrepancy between the State laws and the laws of the United States; so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate court to, the verdict of the jury.

§ 1772. "If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the Constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceeding in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it, by granting a new trial."¹

§ 1773. The appellate jurisdiction is to be "with such exceptions and under such regulations as the Congress shall prescribe." But here a question is presented upon the construction of the Constitution, whether the appellate jurisdiction attaches to the Supreme Court, subject to be withdrawn and modified by Congress, or whether an act of Congress is necessary to confer the jurisdiction upon the court. If the former be the true construction, then the entire appellate jurisdiction, if Congress should make no exceptions or regulations, would attach *proprio vigore* to the Supreme Court. If the latter, then, notwithstanding the imperative language of the Constitution, the Supreme Court is lifeless until Congress have conferred power on it. And if Congress may confer power, they may repeal it. So that the whole efficiency of the judicial power is left by the Constitution

¹ Parsons v. Bedford, 3 Peters's R. 446 to 449.

wholly unprotected and inert, if Congress shall refrain to act. There are certainly very strong grounds to maintain that the language of the Constitution meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action by Congress; and to require this action to divest or regulate it. The language as to the original jurisdiction of the Supreme Court admits of no doubt. It confers it without any action of Congress. Why should not the same language, as to the appellate jurisdiction, have the same interpretation? It leaves the power of Congress complete to make exceptions and regulations; but it leaves nothing to their inaction. This construction was asserted in argument at an earlier period of the Constitution.¹ It was at that time denied; and it was held by the Supreme Court, that, if Congress should provide no rule to regulate the proceedings of the Supreme Court, it could not exercise any appellate jurisdiction.² That doctrine, however, has, upon more mature deliberation, been since overturned; and it has been asserted by the Supreme Court, that if the judicial act (of 1789) had created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigns to it. The legislature could have exercised the power possessed by it of creating a Supreme Court, as ordained by the Constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those constitutional powers undiminished. The appellate powers of the Supreme Court are not given by the judicial act (of 1789). They are given by the Constitution. But they are limited and regulated by that act, and other acts on the same subject.³ (a) And where a rule is provided, all persons will agree that it cannot be departed from.

§ 1774. It should be added, that while the jurisdiction of the courts of the United States is almost wholly under the control of

¹ *Chisholm v. Georgia*, 2 Dall. 419, and Iredell, J.'s, Opinion, p. 432.

² *Wiscart v. Dauchy*, 3 Dall. 321, 326.

³ *Durousseau v. United States*, 6 Cranch, 307, 313, 314; *United States v. Moore*, 3 Cranch, 159, 170, 172.

(a) In *McCardle, Ex parte*, 7 Wall. 506, it was decided that though the appellate jurisdiction of the Supreme Court is conferred by the Constitution, yet it can only

be exercised in the cases prescribed by legislation, and the repeal of an act allowing an appeal would take from the court the right to pass upon the pending cases.

the regulating power of Congress, there are certain incidental powers which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.¹ (a)

§ 1775. Although the judicial department under the Constitution would, from the exposition which has thus been made of its general powers and functions, seem above all reasonable objections, it was assailed with uncommon ardor and pertinacity in the State conventions, as dangerous to the liberties of the people and the rights of the States; as unlimited in its extent and undefined in its objects; as in some portions of its jurisdiction wholly unnecessary and in others vitally defective. In short, the objections were of the most opposite characters, and, if yielded to, would have left it without a shadow of power or efficiency.²

§ 1776. The Federalist has concluded its remarks on the judicial department in the following manner: "The amount of the observations hitherto made on the authority of the judicial department is this: That it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that, in the partition of this authority, a

¹ *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheat. R. 38, 44; *Anderson v. Dunn*, 6 Wheat. R. 204.

² See 2 Elliot's Debates, 380 to 427; 1 Elliot's Debates, 119 to 122; 3 Elliot's Debates, 125 to 145; 2 Amer. Museum. 422, 429, 435; 3 Amer. Museum, 62, 72; Id. 419, 420; Id. 534, 540, 546.

(a) Proceedings for contempt of court are not subject to the ordinary right of trial by jury. *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31; *Ex parte Savin*, 131 U. S. 267; *Ex parte Cuddy*, Id. 280; *Ex parte Terry*, 128 U. S. 289; *Anderson v. Dunn*, 6 Wheat. 204; *Cartwright's Case*, 114 Mass. 230, and cases there cited.

The power of the United States courts over contempts is now regulated in part by statute. This power, it is enacted, "shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said

courts, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts." U. S. Rev. Sts. § 725. The power to punish for contempt is inherent in all courts. *Eilenbecker v. District Court of Plymouth County*, *supra*; *Ex parte Robinson*, 19 Wall. 505; *Cartwright's Case*, *supra*.

very small portion of original jurisdiction has been reserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does in no case *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will ensure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source."¹

§ 1777. The functions of the judges of the courts of the United States are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the President in any executive measures, or to give extrajudicial interpretations of law, or to act as commissioners in cases of pensions, or other like proceedings.²

§ 1778. The next clause of the first section of the third article is "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where such crimes shall have been committed. But when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."³ (a)

§ 1779. It seems hardly necessary in this place to expatiate upon the antiquity or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta,⁴ in which it is declared, "*nullus homo capiatur*,

¹ The Federalist, No. 81. See on the Judiciary the Journal of Convention, pp. 98, 99, 100, 188, 189, 295, 301.

² 5 Marshall's Life of Washington, ch. 6, pp. 433, 441; Sergeant on Const. ch. 29, p. 363 (2d edit. ch. 31, p. 375); Marbury v. Madison, 1 Cranch, 171; Dewhurst v. Coulthart, 3 Dall. R. 499; Hayburn's Case, 2 Dall. R. 409, 410, and note Id., and p. 411; Sergeant on Const. ch. 33, p. 391 (ch. 34, p. 401, 2d edition).

³ See Mr. Marshall's Speech, 5 Wheat. R. Appx. 23, 24.

⁴ Magna Charta, ch. 29 (9 Henry 3d); 2 Inst. 45; 3 Black. Comm. 349; 4 Black. Comm. 349.

(a) This clause does not apply to the State courts. Eilenbecker v. District Court of Plymouth County, 134 U. S. 31.

nec imprisonetur, aut exuletur, aut aliquo modo destruat, &c.; nisi per legale iudicium parium suorum, vel per legem terræ;" no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, &c., but by the judgment of his peers, or by the law of the land. The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the State. When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.¹ It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.² (a)

§ 1780. The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused to hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies? The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a

¹ 2 Kent's Comm. Lect. 24, pp. 1 to 9 (2d edition, pp. 1 to 12); 3 Elliot's Debates, 331, 399.

² A trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of twelve men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.

(a) Work v. State, 2 Ohio St. 296; 402; 2 Leading Criminal Cases, 327 and State v. Cox, 3 English, 436; The People note.
 v. Johnson, 2 Parker, C. C. 322, 329, 363,

double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall.¹ But, to give it real efficiency, it must be preserved in its purity and dignity, and not, with a view to slight inconveniences or imaginary burdens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to wield its potent armor. Mr. Justice Blackstone, with the warmth and pride becoming an Englishman living under its blessed protection, has said: "A celebrated French writer, who concludes that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury."²(a)

§ 1781. It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an

¹ 4 Black. Comm. 349, 350.

² 3 Black. Comm. 379. See also *Id.* 381. I commend to the diligent perusal of every scholar and every legislator the noble eulogium of Mr. Justice Blackstone on the trial by jury. It is one of the most beautiful as well as most forcible expositions of that classical jurist. See 3 Black. Comm. 379, 380, 381; 4 Black. Comm. 349, 350. See also De Lolme, B. 1, ch. 13; B. 2, ch. 16. Dr. Paley's chapter on the administration of justice is not the least valuable part of his work on *Moral Philosophy*. See B. 6, ch. 8. See also 2 Wilson's Law Lect. P. 2, ch. 6, p. 305, &c.

(a) The jury, it is held, are not judges of the law in the federal courts, but are to receive the law from the court. *United States v. Battiste*, 2 Sum. 240; *Stittinus*

v. United States, 5 Cranch, C. C. 573; *United States v. Morris*, 1 Curt. C. C. 53; *United States v. Riley*, 5 Blatch. 206.

oppressive and unjustifiable a manner.¹ But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to be committed.² (a) This was certainly a precaution which, however justifiable in an early and barbarous state of society, is little commendable in its more advanced stages. It has been justly remarked, that in such cases to summon a jury laboring under local prejudices is laying a snare for their consciences; and though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial.³ It was doubtless by analogy to this rule of the common law that all criminal trials are required to be in the State where committed. But as crimes may be committed on the high seas and elsewhere out of the territorial jurisdiction of a State, it was indispensable that in such cases Congress should be enabled to provide the place of trial.

§ 1782. But, although this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousies and alarms of the opponents of the Constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this, further auxiliary rights ought to have been secured.⁴ These objections found their way into the State conventions, and were urged with great zeal against the Constitution. They did not, however, prevent the adoption of that instrument. But they produced such a strong effect upon the public mind, that Congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions which appeared of most force; and these amendments were ratified by the several States, and are now

¹ See 2 Elliot's Debates, 399, 400, 407, 420.

² 2 Hale, P. C. ch. 24, pp. 260, 264; Hawk. P. C., B. 2, ch. 25, § 34; 4 Black. Comm. 305.

³ 3 Black. Comm. 383.

⁴ See 2 Elliot's Debates, 331, 380 to 427; 1 Elliot's Debates, 119, 120, 121, 122; 3 Elliot's Debates, 139, 140, 149, 153, 300.

(a) Because the jurors at first were witnesses.

become a part of the Constitution. They are contained in the fifth and sixth articles of the amendments, (a) and are as follows:—

“No person shall be held to answer for a capital or otherwise infamous crime (b) unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; (c) nor be deprived of life, liberty, or property without due process of law; (d) nor shall private property be taken for public use without just compensation. (e)

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”

§ 1783. Upon the main provisions of these articles a few remarks only will be made, since they are almost self-evident, and can require few illustrations to establish their utility and importance.

(a) These articles apply only to the federal government. - *Ex parte Sawyer*, 124 U. S. 200; *Spies v. Illinois*, 123 U. S. 131.

(b) As to this term see *Ex parte Wilson*, 114 U. S. 417; *Jones v. Robbins*, 8 Gray, 329, 349; *Mackin v. United States*, 116 U. S. 348.

(c) See *Boyd v. United States*, 116 U. S. 616.

(d) See *Green v. Briggs*, 1 Curtis, C. C. 311; *Murray v. Hoboken Land and Improvement Co.*, 18 How. 272; *Freeland v. Williams*, 131 U. S. 405; *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31; *Chicago Ry. Co. v. State*, Id. 418; in which cases, together with the large number cited in connection with

§§ 1789, 1790, the meaning of the words “due process of law” is examined.

(e) Consequential damages from improving streets belonging to the municipality do not come within this last provision. *Northern Transp. Co. v. Chicago*, 99 U. S. 635. When private property is devoted by the owner to the use of the public, the State may reasonably regulate its use, as by fixing a maximum price to be demanded for the benefit. *Munn v. Illinois*, 94 U. S. 113, Field, J., dissenting; *Chicago R. Co. v. Iowa*, Id. 155. When property is “taken,” within the meaning of the Constitution, see *Pumpelly v. Green Bay Canal Co.*, 13 Wall. 166 (overflow of water).

§ 1784. The first clause requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital and infamous crime charged against him. And this is regularly true at the common law of all offences above the grade of common misdemeanors. A grand jury, it is well known, are selected in the manner prescribed by law, and duly sworn to make inquiry and present all offences committed against the authority of the State government within the body of the county for which they are impanelled. In the national courts, they are sworn to inquire and present all offences committed against the authority of the national government, within the State or district for which they are impanelled, or elsewhere within the jurisdiction of the national government. The grand jury may consist of any number, not less than twelve, nor more than twenty-three; and twelve, at least, must concur in every accusation.¹ They sit in secret, and examine the evidence laid before them by themselves. A presentment, properly speaking, is an accusation made *ex mero motu* by a grand jury of an offence upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offence preferred to, and presented upon oath as true, by a grand jury, at the suit of the government. Upon a presentment, the proper officer of the court must frame an indictment before the party accused can be put to answer it.² But an indictment is usually, in the first instance, framed by the officers of the government, and laid before the grand jury. When the grand jury have heard the evidence, if they are of opinion that the indictment is groundless, or not supported by evidence, they used formerly to indorse on the back of the bill "ignoramus," or, "we know nothing of it," whence the bill was said to be *ignored*. But now they assert in plain English, "not a true bill," or, which is the better way, "not found," and then the party is entitled to be discharged, if in custody, without further answer. But a fresh bill may be preferred against him by another grand jury. If the grand jury are satisfied of the truth of the accusation, then they write on the back of the bill, "a true bill" (or, anciently, "*billa vera*"). The bill is then said to be found, and is publicly returned into court; the

¹ 4 Black. Comm. 302, 306.

² Id. 301, 302.

party stands indicted, and may then be required to answer the matters charged against him.¹

§ 1785. From this summary statement, it is obvious that the grand jury perform most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies. Nor is this all;² the indictment must charge the time, and place, and nature, and circumstances of the offence with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability.

§ 1786. There is another mode of prosecution which exists by the common law in regard to misdemeanors; though these also are ordinarily prosecuted upon indictments found by a grand jury. The mode here spoken of is by an information usually at the suit of the government or its officers. An information generally differs in nothing from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law-officer of the government *ex officio*, without the intervention or approval of a grand jury.³ This process is rarely resorted to in America, and it has never yet been formally put into operation by any positive authority of Congress under the national government in mere cases of misdemeanor, though common enough in civil prosecutions for penalties and forfeitures. (a)

§ 1787. Another clause declares, that no person shall be subject, "for the same offence, to be twice put in jeopardy of life and limb." This, again, is another great privilege secured by the common law.⁴ The meaning of it is, that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury, and judgment has passed thereon for or against him. But it does not mean that he shall not be tried for the offence a second time if the jury have been discharged without giving any verdict; or if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor; for

¹ 4 Black. Comm. 305, 306.

² See 1 Tuck. Black. Comm. App. 304, 305; Rawle on Const. ch. 10, p. 132.

³ 4 Black. Comm. 308, 309.

⁴ Hawk. P. C., B. 2, ch. 35; 4 Black. Comm. 335; 4th R. 40, 45, 47.

(a) See *Ex parte Wilson*, 114 U. S. 417.

in such a case his life or limb cannot judicially be said to have been put in jeopardy.¹(a)

§ 1788. The next clause prohibits any person from being compelled, in any criminal case, to be a witness against himself, or being deprived of life, liberty, or property without due process of law. This also is but an affirmance of a common-law privilege.(b) But it is of inestimable value. It is well known that in some countries not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt. And, what is worse, it has been (as if in mockery or scorn) attempted to excuse or justify it, upon the score of mercy and humanity to the accused. It has been contrived, it is pretended, that innocence should manifest itself by a stout resistance, or guilt by plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves.² Cicero, many ages ago,³ though he lived in a state wherein it was usual to put slaves to the torture in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking as they are brief. They are conceived in the spirit of Tacitus, and breathe all his pregnant and indignant sarcasm.⁴ Ulpian, also, at a still later period in Roman jurisprudence, stamped the practice with severe reproof.⁵

§ 1789. The other part of the clause is but an enlargement of the language of Magna Charta, "*nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre*" (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words (by the law of

¹ See *United States v. Haskell*, 4 Wash. Cir. R. 402, 410; *United States v. Perez*, 9 Wheat. R. 579; *Hawk. P. C. B.* 2, ch. 35, § 8; 1 Tuck. Black. Comm. App. 305; *Rawle on the Constitution*, ch. 10, pp. 132, 133; 10 Johns. R. 187. See also 6 Serg. & R. 577; 1 Dever. R. 276; 17 Mass. R. 515.

² 4 Black. Comm. 326; 3 Wilson's Law Lect. 154 to 159.

³ Cicero, *Pro Sulla*, 28.

⁴ Mr. Justice Blackstone quotes them in 4 Black. Comm. 326; 1 Tuck. Black. Comm. App. 304, 305; *Rutherford, Inst. B.* 1, ch. 18, § 5.

⁵ See 3 Wilson's Law Lect. 158; 1 Gilb. Hist. 249.

(a) See 2 Leading Crim. Cas. 357, (b) See *Boyd v. United States*, 116 U. S. 616. where the authorities are stated.

the land) mean by due process of law, (a) that is, without due presentment or indictment, and being brought in to answer there-

(a) "This phrase 'due process of law' has always been one requiring construction; and, as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line applicable to all cases, between proceedings which are by due process of law and those which are not." Miller, J., in *Freeland v. Williams*, 131 U. S. 405. Various proceedings were here enumerated as due process. The case itself was a bill in chancery to enjoin the execution of a judgment, and that was held due process of law. Process of taxation, executed according to established usage, is due process of law. *Bell's Gap R. Co. v. Commonwealth*, 134 U. S. 232; *Palmer v. McMahon*, 133 U. S. 660; *Kentucky R. R. Tax Cases*, 115 U. S. 321; *Springer v. United States*, 102 U. S. 586. Proceedings in cases of contempt are also due process. *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31. *Contra*, of proceedings of a statutory railroad commission empowered to establish rates as a finality, without issue or inquiry had, to the exclusion of the action of the courts. *Chicago Ry. Co. v. State*, 134 U. S. 418. Three judges dissented, on the ground that the regulation and settlement of the fares of railroads and other accommodations, was a legislative prerogative and not a judicial one. See *Georgia R. Co. v. Smith*, 128 U. S. 174; *Dow v. Beidelman*, 125 U. S. 680; *Stone v. Farmers' Loan Co.*, 116 U. S. 307, 325, as to the power to regulate rates over railroads operating within the State. As to the original expression "*per legem terræ*" see Bigelow's *History of Procedure*, 155, note.

The subject of some of these cases involves fundamental conceptions of American Constitutional law, requiring, among other things, indeed, the statement and examination of some hackneyed truths.

The well-known and much canvassed case of *Munn v. Illinois*, 94 U. S. 113, may be taken for convenience, and with a view to a specific example, as the text of a brief note; and we have before us then the question of the power of a State to fix rates of compensation of warehousemen serving the public by means of property which belongs to the warehouseman.

The first consideration touches sovereign power. That term signifies the sum of power which a free State, with force when necessary, can effectually exercise over its citizens. Indeed, the statement may be put as a mere truism; the sovereign power is the power which the sovereign (the State) can exercise effectually, i. e., can exercise without final rupture of itself.

Sovereign power, therefore, has no necessary relation to right, except in so far as interference with right may make resistance probably successful, and destroy the power, — an extreme case. Power and right, however difficult sometimes to separate, are so essentially different, that sovereign power may, and occasionally does destroy particular rights, and may make all rights precarious. That is true, of course, whatever the form of the particular government. The sovereign power of republican America can destroy right as well as can despotic China. Here as well as elsewhere, that power can not only make and unmake written constitutions, it can take away a citizen's property without compensation; it can deprive a man of life, liberty, or property without "due process of law;" for the subversion of the rights of an individual citizen can seldom provoke a destruction of the State.

With us the sovereign power resides in the people. "We, the people of the United States, in order to form a more perfect union . . . do ordain and establish this Constitution for the United States of America." This is true in the

to by due process of the common law.¹(a) So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.²

¹ 2 Inst. 50, 51; 2 Kent's Comm. Lect. 24, p. 10 (2d ed. p. 13); Cave's English Liberties, p. 19; 1 Tuck. Black. Comm. App. 304, 305; Barrington on Statutes, 17 Id. 86, 87.

² Ibid.

double and complex sense in which the people, using the word now and afterwards in the singular as denoting solidarity, is the sovereign at once of the United States and of the particular State inhabited.

The sovereign power resides indeed in the people; and yet not in all things directly and immediately, for the people has by written Constitution solemnly manifested its will that the sovereign power shall be exercised only in certain ways. To those ways the sovereign is pledged; and while it may by revolution act otherwise, it cannot consciously and avowedly do so short of revolution, because the manifestation of the sovereign will (in the Constitution) is constant, instant, and perpetual. The exercise of sovereign power has been given in part to the federal government, and in part retained for the States. Congress on the one hand, and the legislatures on the other (together with the executive and the judiciary) are called into existence by the sovereign, to assist in carrying out the various purposes to be accomplished. They are the people's "substitutes and agents," as the Constitution of Massachusetts has it.

The exercise of all power not committed to the federal government being retained for the States, the States, to the extent of this power retained, possess all power which any nation can possess; necessarily is this true because this power, together with that the exercise of which has been granted to the federal govern-

ment, makes the whole sum of power of the sovereign. Within the power retained, then, the State legislatures may exercise all powers which the English Parliament (to use the natural and familiar illustration) may exercise, in so far as the State constitutions have not limited the sphere of legislation. It can hardly be contended now that, apart from plain constitutional declaration, the authority of the State legislatures is a grant or delegation; but even if that were the correct view, the fact would not affect the power of the States themselves.

If then, within the powers retained, the sovereign manifests its will, its substitutes and agents must execute the same to the extent of their ability; and that too, in a plain case, without raising any question whether the end to be accomplished is right or wrong. Plain wrongdoing may lead to revolution, and for that if for no other reason is not likely to be persisted in, or attempted on any great scale. But the boundaries of wrongdoing are vague: there is a border-land which is debatable, wherein the State may and constantly does act.

The subject for consideration here, if it is within the reserved powers of the States, affords a sufficient example; it is within the border-land of right and wrong. If, here, the sovereign has plainly expressed its will, its substitutes and agents, in a word, its ministers, may not question the thing determined upon; it is impossible that a plain declaration by the sovereign should be questioned by that branch

(a) A statute is not unconstitutional for making it a misdemeanor to practise medicine without a certificate that the

person is a graduate of a reputable medical college. *Dent v. State*, 129 U. S. 114.

§ 1790. The concluding clause is, that private property shall not be taken for public use without just compensation. (a) This

of the government, to be specific, whose office is first to expound and then to enforce the sovereign declaration. To be more specific, the courts cannot assume to find some principle by which the sovereign will, plainly expressed, is considered as contrary *c. g.* to the very theory or spirit of the State. There appears to be no place for the doctrine sometimes suggested, that the courts, for the purpose of overturning State legislation, the power to make which has never in any way been surrendered, may refer to the principles upon which a free government is founded. See Mr. Justice Field, dissenting in *Munn v. Illinois*, at p. 148. That may be done, of course, in a case of doubt in regard to the sovereign will, but not, it is conceived, where that will is expressed in plain language. If the exercise of the power to regulate rates has not been delegated or abandoned, the States *may* regulate rates; the question then is, have the States retained their sovereignty in this particular?

Two provisions of the Constitution of the United States have been the subject of debate upon this question; the provision that private property shall not be taken for public use without just compensation, and the provision that no one shall be deprived of life, liberty, or property without due process of law, the latter provision appearing both in the 5th and in the 14th amendments. The power to regulate rates appears to be consistent with the first-named provision. The provision is construed sometimes to refer only to property of a purely private nature, such as a farm or a horse in ordinary use. To such, the assurance of

protection is given; while in regard to private property devoted to uses and benefits in which the public participates with the owner, the assurance of the sovereign has not been given, and the power may therefore be freely exercised. Sometimes, as in *Illinois*, this doctrine has been declared in State constitutions.

It is not an answer to this to point out that the provision does not refer to cases akin in any way to regulating rates; — that *taking* implies receiving by or for the taker, as in the case of land taken in eminent domain, whereas here there is no receiving by or for the taker if there is a taking of any sort. *Comp. Pumpelly v. Green Bay Canal Co.*, 13 Wall. 166 (flooding land). For, notwithstanding, it is open to reply that, so far as this provision is concerned, no constitutional assurance has been given that rates shall not be regulated; regulation of rates having nothing to do with the provision, the sovereign is not bound to refrain from legislating according to its own pleasure.

But it may be remarked, by the way, that the construction referred to is not likely to be universally accepted. There is a plain and consistent meaning in the words "private property" taken in their natural sense, to wit, as opposed to property owned by the public; and there is no incongruity in the idea that public property may be taken for public purposes; the property of a town or of a county may be taken by the State or by the federal government. Still, if it were true that by settled construction of the federal judiciary the words "private property" have here the meaning of purely private property, that must be binding

(a) See *United States v. Jones*, 109 U. S. 513; *Boom Co. v. Patterson*, 98 U. S. 406; *Davenport Ry. Co. v. Renwick*, 102 U. S. 180.

A corporation entitled to take land

under the law of eminent domain cannot take it without making compensation on the ground that it is being put to unlawful use. *Davenport Ry. Co. v. Renwick*, *supra*.

is an affirmation of a great doctrine established by the common law for the protection of private property.¹(a) It is founded in

¹ 1 Black. Comm. 138, 139.

everywhere, because it was the will of the people in making the Constitution that construction of its provision should be committed to the federal courts. But even if the contrary view, that the words should be taken in their natural sense, were settled, the reply could still be made as before, that to regulate the rates of warehousemen is not to *take*, and therefore to receive by the taker, a man's property; and that again would leave the States free, so far, to legislate as in *Munn v. Illinois*.

The denial, then, of the validity of State legislation regulating rates must, it seems, turn upon the provision that no one shall be deprived of his property without due process of law. Now, it cannot be successfully maintained that legislation, when not otherwise restrained, is "due process." "Due process" is a technical term, however indefinite its meaning in some particulars; some kinds of legislation are indeed due process, as *e. g.* legislation fixing taxation and the mode of assessing and levying taxes; but legislation as such has never been admitted into the standing of due process. Nor is it true to say that private property cannot be absolute because the State may take it for its own needs, and that property only begins where State control ends. (The contrary of both of these statements is urged in an article in the *American Law Review* for Nov.-Dec., 1890, pp. 912, 913.) Such a view is opposed to the theory of property uniformly maintained by the courts, not only of this country, but of England as well, where there is more to say for the denial of absolute ownership.

The proposition in itself, that legis-

lation which cuts off the profits which would accrue from the lawful use of one's property deprives him of his property, seems to the writer unanswerable; or rather it seems almost self-evident. Of what avail the provision in question to protect a man in his property "if the State can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?" Field, J., in *Stone v. Wisconsin*, 94 U. S. 181. But considerations of public policy, or the emphatic and persistent expressions of public feeling in the direction of what appears to be for the public welfare, are often sufficient to affect the courts, though they may not distinctly recognize or acknowledge the influence. To such influences legislatures have avowedly yielded in the regulation of rates; and by such influences, the writer ventures, though with no little hesitation, to think that the Supreme Court of the United States, followed by the Court of Appeals of New York (*People v. Budd*, 117 N. Y. 1), have not been unaffected.

How far the interpretation or construction of constitutional provisions can be justified by the change of circumstances or of temper in the public is a most serious question; but that construction and interpretation have, in some cases, gone in advance of former views, owing in part at least to change of circumstances, is matter of history, which he who runs may read. And, indeed, it is apprehended that this is in entire accord with the sovereign will as originally manifested in the formation of the Constitution itself. Interpretation and construction were delegated (in large

(a) "This clause is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the

States." Chief Justice Marshall, in *Baron v. Baltimore*, 7 Pet. 250; *Boring v. Williams*, 17 Ala. 516. See also *Withers v. Buckley*, 20 How. 84.

natural equity, and is laid down by jurists as a principle of universal law.¹ (a) Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers.² (b)

¹ 2 Kent's Comm. Lect. 24, pp. 275, 276 (2d edit. pp. 339, 340); 3 Wilson's Law Lect. 203; Ware v. Hylton, 3 Dall. R. 194, 235; 1 Black. Comm. 138, 139, 140.

² See 1 Tuck. Black. Comm. App. 305, 306; Rawle on Const. ch. 10, p. 123. See also Van Horn v. Dorrance, 2 Dall. 384.

part) to the courts; and it is not to be presumed that men of the ability, endowments, and wisdom of the framers of the Constitution of the United States, who stand for the people and sovereign, should have supposed that time could not produce changes which would demand action not then required. And so it is that it is seldom to be considered a conclusive test to inquire what would have been accepted by the States at the time the Constitution was adopted. The will of the sovereign, however long ago expressed, must ever be taken as a wise will, having due regard to the future. See *ante*, note to § 1061.

But this is dangerous ground, and the judiciary has always been governed by the strongest conservatism in entering upon it. In the case under consideration it is a matter of extreme doubt whether the court has not gone too far. It would seem wiser to leave such matters to the people in their sovereign character, for such change as they may think that the changes of time have required.

(a) There may be cases of extreme necessity, as the pulling down of houses and raising bulwarks for the public defence, seizing private provisions for the army in time of war, when the owner has no redress. See 9 Georgia R. 341; Mitchell v. Harmony, 13 How. 115. Whether the government is liable for the destruction of property by a naval officer in the course of hostilities, may depend

upon the time and circumstances, and the necessity for the act. It will generally be a question of fact. Wiggins v. United States, 1 Ct. of Cl. Rep. 182.

(b) In the regulation of the business of local railroads the legislature could not require free carriage, it seems. Georgia R. Co. v. Smith, 128 U. S. 174. Legislation which prohibits the manufacture of intoxicating liquors does not deprive a man who owns a distillery of his property without due process. Kidd v. Pearson, 128 U. S. 1; Foster v. Kansas, 112 U. S. 205; Boston Beer Co. v. Massachusetts, 97 U. S. 25; Barmeyer v. Iowa, 18 Wall. 129. See Crowley v. Christensen, 137 U. S. 86. Nor does legislation which authorizes the abating of a distillery as a nuisance. *Ibid.* Statute may make color-blindness a disqualification for service on railroads. Nashville R. Co. v. State, 128 U. S. 96. Requiring a railroad company to pay for the services of examination for the purpose is not taking property without due process of law. *Ibid.*

Proceedings in the enforcement of taxation are not without due process because they do not conform to the common course of proceedings in the courts of justice. Bell's Gap R. Co. v. Commonwealth, 134 U. S. 232; Palmer v. McMahon, 133 U. S. 660; Walston v. Nevin, 128 U. S. 578; Davidson v. New Orleans, 96 U. S. 104.

Further as to due process, see York v.

§ 1791. The other article, in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes. The trial is always public; the witnesses are sworn, and give in their testimony (at least in capital cases) in the presence of the accused; the nature and cause of the accusation are accurately laid down in the indictment; and the trial is at once speedy, impartial, and in the district of the offence.¹(a) Without in any measure impugning the propriety of these provisions, it may be suggested that there seems to have been an undue solicitude to introduce into the Constitution some of the general guards and proceedings of the common law in criminal trials (truly admirable in themselves), without sufficiently adverting to the consideration, that unless the whole system is incorporated, and especially the law of evidence, a corrupt legislature, or a debased and servile people, may render the whole little more than a solemn pageantry. If, on the other hand, the people are enlightened, and honest, and zealous in defence of their rights and liberties, it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury.²

§ 1792. The remaining clauses are of more direct significance

¹ See 4 Black. Comm. ch. 23 to ch. 28; Hawkins, P. C. B. 2, ch. 46, § 1; 1 Tuck. Black. Comm. App. 304, 305.

² See Bawle on Const. ch. 10, pp. 128, 129.

Texas, 137 U. S. 15; Caldwell v. Texas, Id. 692; Huling v. Kaw Valley R. Co., 130 U. S. 559; Sands v. Manistie River Imp. Co., 123 U. S. 238; Church v. Kelsey, 121 U. S. 232; Arrowsmith v. Harmoning, 118 U. S. 194; Little Rock R. Co. v. Worthen, 120 U. S. 97; Hilton v. Merritt, 110 U. S. 97; Hurtado v. California, Id. 516; Springer v. United States, 102 U. S. 586; Hagar v. Reclamation District, 111 U. S. 701; Provident Inst. v. Jersey City, 113 U. S. 506; *Ex parte* Wall, 107 U. S. 265 (as to striking an attorney off the roll); Barton v. Barbour, 104 U. S. 126 (proceedings in equity);

Kelly v. Pittsburg, 104 U. S. 78; Pearsons v. Yewdall, 95 U. S. 294; McMillen v. Anderson, Id. 37; Pennoyer v. Neff, Id. 714; Davidson v. New Orleans, 96 U. S. 97; Kennard v. Louisiana, 92 U. S. 480; Garrison v. New York, 21 Wall. 196; Beall v. New Mexico, 16 Wall. 535 (statute authorizing judgment to be entered against a surety upon judgment against the principal); Slaughter House Cases, Id. 36; *In re* Kemmler, 136 U. S. 436 (under a law for execution by electricity).

(a) Cooley Const. Limitations, 319-328.

and necessity. The accused is entitled to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel. A very short review of the state of the common law on these points will put their propriety beyond question. In the first place, it was an anciently and commonly-received practice, derived from the civil law, and which Mr. Justice Blackstone says,¹ in his day, still obtained in France, though since the revolution it has been swept away, not to suffer the party accused in capital cases to exculpate himself by the testimony of any witnesses. Of this practice the courts grew so heartily ashamed, from its unreasonable and oppressive character, that another practice was gradually introduced of examining witnesses for the accused, but not upon oath; the consequence of which was, that the jury gave less credit to this latter evidence than to that produced by the government. Sir Edward Coke denounced the practice as tyrannical and unjust, and contended that in criminal cases the party accused was entitled to have witnesses sworn for him. The House of Commons, soon after the accession of the house of Stuart to the throne of England, insisted in a particular bill then pending, and against the efforts both of the crown and the House of Lords carried a clause affirming the right, in cases tried under that act, of witnesses being sworn for as well as against the accused. By the statute of 7 Will. 3, ch. 3, the same measure of justice was established throughout the realm in cases of treason, and afterwards, in the reign of Queen Anne, the like rule was extended to all cases of treason and felony.² The right seems never to have been doubted or denied in cases of mere misdemeanors.³ For what causes and upon what grounds this distinction was maintained, or even excused, it is impossible to assign any satisfactory or even plausible reasoning.⁴ Surely, a man's life must be of infinitely more value than any subordinate punishment; and if he might protect himself against the latter by proofs of his innocence, there would seem to be irresistible reasons for permitting him to do the same in capital offences.⁵ The common suggestion

¹ 4 Black. Comm. 359; Rawle on Const. ch. 10, pp. 128, 129.

² 4 Black. Comm. 359, 360; 3 Wilson's Law Lect. 170, 171; Hawk. P. C. ch. 46, § 160; 2 Hale, P. C. 283.

³ Hawk. P. C. ch. 46, § 159; 2 Hale, P. C. 283; 1 Tuck. Black. Comm. App. 305.

⁴ 2 Hale, P. C. 283.

⁵ Rawle on Const. ch. 19, pp. 129, 130.

has been, that in capital cases no man could, or rather ought to, be convicted unless upon evidence so conclusive and satisfactory as to be above contradiction or doubt. But who can say whether it be in any case so high until all the proofs in favor as well as against the party have been heard? Witnesses for the government may swear falsely and directly to the matter in charge, and until opposing testimony is heard there may not be the slightest ground to doubt its truth, and yet, when such is heard, it may be incontestable that it is wholly unworthy of belief. The real fact seems to be, that the practice was early adopted into the criminal law in capital cases in which the crown was supposed to take a peculiar interest, in base subserviency to the wishes of the latter. It is a reproach to the criminal jurisprudence of England, which the state trials, antecedently to the revolution of 1688, but too strongly sustain. They are crimsoned with the blood of persons who were condemned to death not only against law but against the clearest rules of evidence.

§ 1793. Another anomaly in the common law is, that in capital cases the prisoner is not, upon his trial upon the general issue, entitled to have counsel, unless some matter of law shall arise proper to be debated. That is, in other words, that he shall not have the benefit of the talents and assistance of counsel in examining the witnesses or making his defence before the jury. Mr. Justice Blackstone, with all his habitual reverence for the institutions of English jurisprudence as they actually exist, speaks out upon this subject with the free spirit of a patriot and a jurist. This, he says, is "a rule, which — however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner, that is, shall see that the proceedings against him are legal and strictly regular — seems to be not all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?"¹ The defect has indeed been cured in England in cases of treason;² but it still remains unprovided

¹ 4 Black. Comm. 355. Mr. Christian, in his note on the passage, has vindicated the importance of allowing counsel in a strain of manly reasoning. 4 Black. Comm. 356, note 9.

² 4 Black. Comm. 356; 1 Tuck. Black. Comm. App. 305.

for in all other cases, to—what one can hardly help deeming—the discredit of the free genius of the English Constitution. (a)

§ 1794. The wisdom of both of these provisions is, therefore, manifest, since they make matter of constitutional right what the common law had left in a most imperfect and questionable state.¹ The rights to have witnesses sworn and counsel employed for the prisoner, are scarcely less important privileges than the right of a trial by jury. The omission of them in the Constitution is a matter of surprise; and their present incorporation is matter of honest congratulation among all the friends of rational liberty.

§ 1795. There yet remain one or two subjects connected with the judiciary, which, however, grow out of other amendments made to the Constitution, and will naturally find their place in that part of these Commentaries which embraces a review of the remaining amendments. (b)

¹ 3 Wilson's Law Lect. 170, 171; 1 Tuck. Black. Comm. App. 305; Rawle on Const. ch. 10, pp. 128, 129.

(a) This discredit was removed by Stat. 6 & 7 Will. IV. c. 114, by which a full defence by counsel is permitted in all cases of felony. See Cooley, Const. Limitations, 330-338.

(b) It is a rule of obvious propriety that, where different tribunals are sitting within the same jurisdiction to administer the same laws, the decisions should be in harmony. Where the laws of the United States are in question, uniformity is assured by the appellate jurisdiction conferred upon the Supreme Court of the United States over the State courts in those cases; but there is no such common appellate tribunal in the case of questions of State law. Congress, however, has endeavored to secure uniformity, as far as may be, by requiring the federal courts to adopt as their rule of decision "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide." Act of Sept. 24, 1789, 1 Stat. at Large, 92. The laws of the States are the laws as construed and applied by the courts. In *Beauregard v. New Or-*

leans, 18 How. 502, Mr. Justice Campbell says: "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands." In *Bank of Hamilton v. Dudley*, 2 Pet. 524, it was contended that the exclusive power of State courts to construe legislative acts did not extend to the paramount law, so as to enable them to give efficacy to an act which was contrary to the State constitution; but Marshall, Ch. J., said: "We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law." Again, in *Elmendorf v. Taylor*, 10 Wheat. 159, the same eminent judge says: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which proposed to

be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States in the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." And in *Green v. Neal*, 6 Pet. 298, it is said by McLean, J.: "The decision of the highest judicial tribunal of a State should be considered as final by this court, not because the State tribunal in such a case has any power to bind this court, but because, in the language of the court in *Shelby v. Guy*, 11 Wheat. 361, 'a fixed and received construction by a State, in its own courts, makes a part of the statute law.'" And see *Jackson v. Chew*, 12 Wheat. 162, per Thompson, J.

In further illustration of the same doctrine, the following cases are cited: *Sims v. Irvine*, 3 Dall. 425; *McKeen v. Delancy*, 5 Cranch, 22; *Polk v. Wendal*, 9 Cranch, 87; *Preston v. Browder*, 1 Wheat. 115; *Mutual Assurance Co. v. Watts*, Id. 279; *Shipp v. Miller*, 2 Wheat. 316; *Thatcher v. Powell*, 6 Wheat. 119; *Bell v. Morrison*, 1 Pet. 351; *Waring v. Jackson*, Id. 570; *De Wolf v. Rabaud*, Id. 476; *Fullerton v. Bank of United States*, Id. 604; *Gardner v. Collins*, 2 Pet. 58; *Beach v. Viles*, Id. 675; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99; *United States v. Morrison*, 4 Pet. 124; *Henderson v. Griffin*, 5 Pet. 151; *Hinde v. Vattier*, Id. 398; *Ross v. McLung*, 6 Pet. 283; *Marlatt v. Silk*, 11 Pet. 1; *Bank*

of *United States v. Daniels*, 12 Pet. 82; *Clarke v. Smith*, 18 Pet. 195; *Ross v. Duval*, Id. 45; *Wilcox v. Jackson*, Id. 498; *Harpending v. Reformed Church*, 16 Pet. 445; *Martin v. Waddell*, Id. 367; *Amis v. Smith*, Id. 303; *Porterfield v. Clark*, 2 How. 76; *Lane v. Vick*, 3 How. 464; *Foxcroft v. Mallett*, 4 How. 353; *Barry v. Mercein*, 5 How. 103; *Rowan v. Runnels*, Id. 134; *Van Rensselaer v. Kearney*, 11 How. 297; *Pease v. Peck*, 18 How. 595; *Fisher v. Haldeman*, 20 How. 186; *Parker v. Kane*, 22 How. 1; *Suydam v. Williamson*, 24 How. 427; *Sumner v. Hicks*, 2 Black, 532; *Chicago v. Robbins*, Id. 418; *Miles v. Caldwell*, 2 Wall. 35; *Williams v. Kirkland*, 13 Wall. 306; *Springer v. Foster*, 2 Story, C. C. 383; *Neal v. Green*, 1 McLean, 18; *Paine v. Wright*, 6 McLean, 395; *Boyle v. Arledge*, Hemp. 620; *Griffing v. Gibb*, McAll. 212; *Bayerque v. Cohen*, Id. 113; *Wick v. The Samuel Strong*, Newb. 187; *New England Screw Co. v. Bliven*, 3 Blatch. 240; *Bronson v. Wallace*, 4 Blatch. 465; *Van Bokelen v. Brooklyn City R. R. Co.*, 5 Blatch. 379; *United States v. Wonson*, 1 Gall. 5; *Society, &c. v. Wheeler*, 2 Gall. 105; *Coates v. Muse*, Brock. 539; *Meade v. Beale*, Taney, 339; *Parker v. Phetteplace*, 2 Cliff. 70; *King v. Wilson*, 1 Dill. 555.

In *Green v. Neal*, 6 Pet. 291, an important question was presented as to the proper course to be pursued by the Supreme Court of the United States under somewhat embarrassing circumstances. That court had been called upon to put a construction upon a State statute of limitations, and had done so. Afterwards the same question had been before the Supreme Court of the State, and in repeated cases had been decided otherwise. The question now was, whether the Supreme Court would follow its own decision, or reverse that in order to put itself in harmony with the State decisions. The subject is considered at length by McLean, J., who justly concludes that "an adherence by the federal courts to the exposition of the local law, as given

by the courts of the State, will greatly tend to preserve harmony in the exercise of the judicial power in the State and federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority." And it accordingly reversed its rulings to make them conform to those of the State court. See also *Suydam v. Williamson*, 24 How. 427; *Lefingwell v. Warren*, 2 Black, 599; *Blossburg R. Co. v. Tioga R. Co.*, 5 Blatch. 387; *Smith v. Shriver*, 3 Wall. Jr. 219. It is of course immaterial that the court may still be of opinion that the State court has erred, or that the decisions elsewhere are different. *Bell v. Morrison*, 1 Pet. 360. But where the Supreme Court has held that certain contracts for the price of slaves were not made void by the State constitution, and afterwards the State court held otherwise, the Supreme Court, regarding this decision wrong, declined to reverse their own ruling. *Rowan v. Runnels*, 5 How. 134. Compare this with *Nesmith v. Sheldon*, 7 How. 812, in which the court followed, without examination or question, the State decision

that a State general banking law was in violation of the constitution of the State. The United States circuit court had held otherwise previous to the State decision. *Falconer v. Campbell*, 2 McLean, 195.

This doctrine does not apply to questions not at all dependent upon local statutes or usages; as, for instance, to contracts and other instruments of a commercial and general nature, like bills of exchange, *Swift v. Tyson*, 16 Pet. 1; and insurance contracts, *Robinson v. Commonwealth Ins. Co.*, 3 Sum. 220. And see *Reimsdyk v. Kane*, 1 Gall. 371; *Austin v. Miller*, 5 McLean, 153; *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 322; *Bragg v. Meyer*, 1 McAll. 408. Nor to decisions which sustain violations of the Constitution of the United States. *State Bank v. Knoup*, 16 How. 369; *Jefferson Branch Bank v. Skelley*, 1 Black, 436.

And where a contract has been made under a settled construction of the State constitution by its highest court, the Supreme Court will sustain it, notwithstanding the State court has since overruled its former decision. *Gelpcke v. Dubuque*, 1 Wall. 176. C.

CHAPTER XXXIX.

DEFINITION AND EVIDENCE OF TREASON.

§ 1796. THE third section of the third article is as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

§ 1797. Treason is generally deemed the highest crime which can be committed in civil society, since its aim is an overthrow of the government, and a public resistance by force of its powers. Its tendency is to create universal danger and alarm; and on this account it is peculiarly odious, and often visited with the deepest public resentment. Even a charge of this nature, made against an individual, is deemed so opprobrious, that, whether just or unjust, it subjects him to suspicion and hatred; and, in times of high political excitement, acts of a very subordinate nature are often, by popular prejudices as well as by royal resentment, magnified into this ruinous importance.¹ It is, therefore, of very great importance that its true nature and limits should be exactly ascertained; and Montesquieu was so sensible of it, that he has not scrupled to declare that if the crime of treason be indeterminate that alone is sufficient to make any government degenerate into arbitrary power.² The history of England itself is full of melancholy instruction on this subject. By the ancient common law it was left very much to discretion to determine what acts were and were not treason; and the judges of those times, holding office at the pleasure of the crown, became but too often instruments in its hands of foul injustice. At the instance of tyrannical princes they had abundant opportunities to create *constructive* treasons; that is, by forced and arbitrary constructions, to raise offences into the guilt and punishment of treason which

¹ 3 Wilson's Law Lect. ch. 5, p. 95, &c.

² Montesq. Spirit of Laws, B. 12, ch. 7; 4 Black. Comm. 75.

were not suspected to be such.¹ The grievance of these constructive treasons was so enormous, and so often weighed down the innocent and the patriotic, that it was found necessary, as early as the reign of Edward III.,² for Parliament to interfere and arrest it, by declaring and defining all the different branches of treason. This statute has ever since remained the pole-star of English jurisprudence upon this subject. And although, upon temporary emergencies and in arbitrary reigns, since that period, other treasons have been created, the sober sense of the nation has generally abrogated them, or reduced their power within narrow limits.³

§ 1798. Nor have republics been exempt from violence and tyranny of a similar character. The Federalist has justly remarked, that new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other.⁴

§ 1799. It was under the influence of these admonitions, furnished by history and human experience, that the convention deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts or by Congress, upon the crime of treason. It confines it to two species: first, the levying of war against the United States; and secondly, adhering to their enemies, giving them aid and comfort.⁵ In so doing, they have adopted the very words of the statute of treason of Edward the Third; and thus, by implication, in order to cut off at once all chances of arbitrary constructions, they have recognized the well-settled interpretation of these phrases in the administration of criminal law which has prevailed for ages.⁶

§ 1800. Fortunately, hitherto but few cases have occurred in the United States in which it has been necessary for the courts of justice to act upon this important subject. But whenever they

¹ 4 Black. Comm. 75; 3 Wilson's Law Lect. 96; 1 Tuck. Black. Comm. App. 275, 276.

² Stat. 25 Edw. 3, ch. 2; 1 Hale, P. C. 259.

³ See 4 Black. Comm. 85 to 92; 3 Wilson's Law Lect. 96, 97, 98, 99; 1 Tuck. Black. Comm. App. 275.

⁴ The Federalist, No. 43; 3 Wilson's Law Lect. 96.

⁵ See also Journal of Convention, 221, 269, 270, 271.

⁶ See 4 Black. Comm. 81 to 84; Foster, Cr. Law, Discourse I. But see 4 Tuck. Black. Comm. App. note B.

have arisen, the judges have uniformly adhered to the established doctrines, even when executive influence has exerted itself with no small zeal to procure convictions.¹ On one occasion only has the consideration of the question come before the Supreme Court; and we shall conclude what we have to say on this subject with a short extract from the opinion delivered upon that occasion: "To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true, that in that case the soldiers enlisted were to serve without the realm; but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

§ 1801. "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war."²

§ 1802. The other part of the clause, requiring the testimony of two witnesses to the same overt act or a confession *in open*

¹ See 4 Jefferson's Corresp. 72, 75, 78, 83, 85, 86, 87, 88, 90, 101, 102, 103. See Burr's Trial in 1807; 3 Wilson's Law Lect. 100 to 106.

² *Ex parte Bollman*, 4 Cranch, 126. See also *United States v. Burr*, 4 Cranch, 469 to 508, &c.; *Serg. on Const.* ch. 30 (2d edit. ch. 32); *People v. Lynch*, 1 Johns. R. 553.

court,¹(a) to justify a conviction, is founded upon the same reasoning. A like provision exists in British jurisprudence, founded upon the same great policy of protecting men against false testimony and unguarded confessions, to their utter ruin. It has been well remarked, that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence.² To which it may be added, that it is easy to be forged, and the most difficult to guard against. An unprincipled demagogue or a corrupt courtier might otherwise hold the lives of the purest patriots in his hands without the means of proving the falsity of the charge, if a secret confession uncorroborated by other evidence would furnish a sufficient foundation and proof of guilt. And wisely, also, has the Constitution declined to suffer the testimony of a single witness, however high, to be sufficient to establish such a crime, which rouses against the victim at once private honor and public hostility.³ There must, as there should, be a concurrence of two witnesses to the same overt, that is, open act of treason, who are above all reasonable exception.⁴

§ 1803. The subject of the power of Congress to declare the punishment of treason, and the consequent disabilities, have been already commented on in another place.⁵(b)

¹ See *United States v. Fries*, Pamph. p. 171.

² 4 Black. Comm. 356, 357.

³ See 4 Black. Comm. 357, 358.

⁴ *United States v. Burr*, 4 Cranch, 469, 496, 503, 506, 507.

⁵ See *ante*, §§ 1291 to 1296.

(a) See for a definition of treason, *United States v. Hoxie*, 1 Paine, 265; *United States v. Hanway*, 2 Wallace, Jr. 139; *Regina v. Frost*, 9 C. & P. 129; 2 Bishop on Crim. Law, § 1032; 3 Greenl. Ev. § 237; *Boston Law Rep.* 1851, p. 413.

(b) By the act of July 17, 1862, a change was made as regards the punishment for the crime of treason subsequently

committed, and it might thereafter be death or fine and imprisonment in the discretion of the court, except when it consisted in engaging in or assisting a rebellion or insurrection against the authority of the United States or the laws thereof, in which event the death penalty was not to be inflicted. See *United States v. Greathouse*, 2 Abb. U. S. Rep. 376.

CHAPTER XL.

PRIVILEGES OF CITIZENS — FUGITIVES — SLAVES.

§ 1804. THE fourth article of the Constitution contains several important provisions, some of which have been already considered. Among these are the faith and credit to be given to State acts, records, and judgments, and the mode of proving them, and the effect thereof; the admission of new States into the Union, and the regulation and disposal of the territory and other property of the United States.¹ We shall now proceed to those which still remain for examination.

§ 1805. The first is, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." (a) There was an article upon the same subject² in the confederation, which declared "that the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively," &c.³ It was remarked by the Federalist that there is a strange confusion in this language. Why the terms *free inhabitants* are used in one part of the article, *free citizens* in another, and *people* in another; or what is meant by superadding to "all privileges and immunities of free citizens" "all the privileges of trade and commerce," cannot easily be determined. It seems to be a construction, however, scarcely avoidable, that those who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled in every other State to all

¹ See *ante*, §§ 1211 to 1230, §§ 1308 to 1315, and §§ 1316 to 1324.

² See 1 Tuck. Black. Comm. App. 365.

³ Confederation, art. 4.

(a) This includes the right to bring 107. Further as to this provision, see suits. *Cole v. Cunningham*, 133 U. S. *Kimmish v. Ball*, 129 U. S. 217.

the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State. So that it was in the power of a particular State (to which every other State was bound to submit) not only to confer the rights of citizenship in other States upon any persons whom it might admit to such rights within itself, but upon any persons whom it might allow to become *inhabitants* within its jurisdiction. But even if an exposition could be given to the term *inhabitants*, which would confine the stipulated privileges to citizens alone, the difficulty would be diminished only, and not removed. The very improper power was, under the confederation, still retained in each State of naturalizing aliens in every other State.¹

§ 1806. The provision in the Constitution avoids all this ambiguity.² It is plain and simple in its language, and its object is not easily to be mistaken. Connected with the exclusive power of naturalization in the national government, it puts at rest many of the difficulties which affected the construction of the article of the confederation.³ It is obvious that if the citizens of each State were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances.⁴ (a)

¹ The Federalist, No. 42. See also Id. No. 80 ; *ante*, § 1098.

² See Journal of Convention, 222, 302.

³ But see 1 Tuck. Black. Comm. App. 365.

⁴ *Carfield v. Coryell*, 4 Wash. Cir. R. 371 ; Serg. on Const. ch. 31. p. 384 (ch. 33, p. 393, 2d edit.) ; *Livingston v. Van Ingen*, 9 Johns. R. 507.

(a) "What are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all

comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain

§ 1807. The next clause is as follows: "A person charged in any State with treason, felony, or other crime, (a) who shall flee

actions of every kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by citizens of the other State, — may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.' " Washington, J., in *Corfield v. Coryell*, 4 Wash. C. C. 380. The Supreme Court will not describe and define these privileges and immunities in a general classification, preferring to deal with each case as it may come up. *Conner v. Elliott*, 18 How. 591. Rights attached by law to contracts, by reason of the place where they are made or executed, wholly irrespective of the citizenship of the parties thereto, cannot be deemed privileges of citizens within the meaning of the Constitution. *Ibid.* The provision does not

apply to corporations. *Warren Manuf. Co. v. Ætna Ins. Co.*, 2 Paine, 501; *Paul v. Virginia*, 8 Wall. 180. In this last case Mr. Justice Field says: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N. Y. 607. Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with the citizens of those States, the republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

"But the privileges and immunities secured to citizens of each State in the several States by the provision in question,

(a) In *Kentucky v. Dennison*, 24 How. 66, it was declared that the words "treason, felony, or other crime," here employed, include every offence forbidden and made punishable by the laws of the State where the offence is committed. But it was decided that if the governor of a State should refuse on proper demand to deliver up a fugitive from justice, the

federal courts had no power to compel him to perform the duty.

To warrant the surrender of a person under this clause in any case, it must appear from the papers that he had committed the crime in the State from which the requisition proceeds. *Ex parte Smith*, 3 McLean, 121.

from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be deliv-

are those privileges and immunities which are common to the citizens in the latter State, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home unless the assent of other States to their enjoyment therein be given."

The following cases will throw further light upon the meaning of this clause of the Constitution. *Butler v. Farnsworth*, 4 Wash. C. C. 101; *State v. Medbury*, 3 R. I. 138; *Murray v. McCarthy*, 3 Munf. 393; *Lemmon v. New York*, 20 N. Y. 562; *Campbell v. Morris*, 3 H. & McH. 554; *Abott v. Bayley*, 6 Pick. 92; *Amy v. Smith*, 1 Lit. 326; *Crandall v. State*, 10 Conn. 340; *Commonwealth v. Towles*, 5 Leigh, 743; *Haney v. Marshall*, 9 Md. 194; *Ward v. State*, 31 Md. 279; *Slaughter v. Commonwealth*, 13 Grat. 767; *People v. Coleman*, 4 Cal. 46; *People v. Imley*, 20 Barb. 68; *Fire Department v. Noble*, 3 E. D. Smith, 441; *Fire Department v. Helfenstein*, 16 Wis. 136; *People v. Thurber*, 13 Ill. 554; *Ducat v. Chicago*, 48 Ill. 172; affirmed in 10 Wall 410; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *Downham v. Alexandria Council*, 10 Wall. 173; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 567. This whole subject received a careful examination at the hands of Mr. Justice Clifford in the recent case of *Ward v. Maryland*, decided by the Supreme Court early in 1872, and reported in 12 Wall. 418. In that case it was declared that a State license tax which discriminated against commodities the production of other States of the Union, was void as abridging the

privileges and immunities of the citizens of such other States. A synopsis of the law, and the views of the court thereon, are given by the learned judge as follows:—

"Persons not permanent residents in the State are prohibited by the laws of Maryland from selling, offering for sale, or exposing for sale, within a certain district of the State, any goods whatever other than agricultural products and articles manufactured in the State, either by card, sample, or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do. Licenses may be granted by the proper authorities of the State for that purpose, on the payment of three hundred dollars, 'to run one year from date.'

"Both residents and non-residents of that district are also forbidden to suffer or permit any person, not a permanent resident of the State, and not in their regular employment or service, to sell any goods in that way under their name or the name of their firm, or at their store, warehouse, or place of business.

"Offenders against either of those prohibitions are made liable to indictment, and, upon conviction, may be fined not less than four hundred nor more than six hundred dollars for each offence. *Sess. Acts*, 1868, p. 786.

"Ward, the defendant, is a citizen of New Jersey, and not a permanent resident of Maryland, and the record shows that he, on the day therein named, at a place within the prohibited district, sold to the persons therein named, 'by specimen, to wit, by sample,' certain goods other than agricultural products or articles manufactured in the State, without first obtaining a license so to do, and that he was indicted for those acts in the proper criminal court, and was arraigned therein and pleaded not guilty to the indictment. Apart from the plea of not

ered up to be removed to the State having jurisdiction of the crime." (a) A provision, substantially the same, existed under the confederation.¹

¹ Confederation, Art. 4.

guilty is the further statement in the record that the defendant 'puts himself upon the judgment of the court here, according to the act of assembly in such cases made and provided,' and that the attorney for the State doth the like.

"All matters of fact having been agreed, the parties submitted the case to the court to the end that the judgment of the court might be obtained whether the statute of the State was or was not constitutional and valid. Judgment was rendered for the State, and the criminal court sentenced the defendant to pay a fine of four hundred dollars and costs, and the court below, upon appeal, affirmed the judgment.

"Congress possesses the power to regulate commerce among the several States as well as commerce with foreign nations, and the Constitution also provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; and the defendant contends that the statute of the State under consideration, in its practical operation, is repugnant to both of those provisions of the Constitution, as it either works a complete prohibition of all commerce from the other States in goods to be sold by sample within the limits of the described district, or at least creates an unjust and onerous discrimination in favor of the citizens of the State enacting the statute, in respect to an extensive and otherwise lucrative branch of interstate commerce, by securing to the citizens of that State, if not the exclusive control of the market, very important special privileges and immunities by exemption from burdensome requirements and onerous exactions imposed upon the citizens of the other States desirous of engaging in the same mercantile pursuits in that district.

"Attempt is made, in argument, to show, in behalf of the State, that the statute in question does not make any such discrimination against the citizens of the other States as is supposed by the defendant; that the citizens of the State are, in fact, subjected to substantially the same requirements and exactions as are imposed upon the citizens of other States; but it is too clear for argument, in a judicial opinion, that the articles of the code referred to as establishing that theory do not support the proposition, nor do they give it any countenance whatever. Those enactments forbid resident traders other than the grower, maker, or manufacturer, to barter or sell any goods or chattels without first obtaining a license in the manner therein prescribed, and they also point out the steps to be taken by the applicant to obtain it, and what he must state in his application for that purpose.

"Small traders, whose stock generally kept on hand at the principal season of sale does not exceed one thousand dollars, and are not engaged in selling spirituous or fermented liquors, are required to pay for the license the sum of twelve dollars. If more than one thousand dollars and not more than fifteen hundred dollars, they are required to pay the sum of fifteen dollars; and so on through ten other gradations, the last of which requires the applicant to pay the sum of one hundred and fifty dollars, where his stock generally kept on hand at the principal season of sale exceeds forty thousand dollars, which is the largest exaction made of any resident trader not engaged in the sale of spirituous or fermented liquors. Compare one set of the regulations with the other, and comment is unnecessary, as the comparison shows to a demonstration that the

(a) See *Ex parte Reggel*, 114 U. S. 642.

§ 1808. It has been often made a question, how far any nation is, by the law of nations, and independent of any treaty

statute in question does discriminate in favor of the citizens of the State, and that the opposite theory finds no support from the articles of the code which forbid resident traders from bartering or selling goods or chattels without first obtaining a license for that purpose, as therein prescribed."

After alluding to questions which had been made, whether the act did not conflict with other provisions of the Constitution, the learned judge proceeds:—

"But it is not necessary to decide any of those questions in the case before the court, as the court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. *Woodruff v. Parham*, 8 Wall. 139; *Hinson v. Lott*, 8 Id. 151.

"Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or some other State, provided the tax imposed is uniform; but the court, at the same time, decides in both cases that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself, and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. *Brown v. Maryland*, 12 Wheat. 444; *People v. Maring*, 3 Keyes, N. Y. 374.

"Imposed, as the exaction is, upon the persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court. Few cases have arisen in which this court has found it necessary to apply the guaranty ordained in the clause of the Constitution under consideration. *Conner v. Elliott*, 18 How. 593.

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property, to take and hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. *Cooley on Const. Lim.* 16; *Brown v. Maryland*, 12 Wheat. 449.

"Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell or offer or expose for sale in that district, without being sub-

stipulations, bound to surrender upon demand fugitives from justice, who, having committed crimes in another country, have fled thither for shelter. Mr. Chancellor Kent considers it clear upon principle, as well as authority, that every State is bound to deny an asylum to criminals and, upon application and due examination of the case, to surrender the fugitive to the foreign State where the crime has been committed.¹ Other distinguished judges and jurists have entertained a different opinion.² (a) It is

¹ Kent's Comm. Lect. 2, p. 36 (2d edit. pp. 36, 37); *Matter of Washburn*, 4 Johns. Ch. R. 106; *Rex v. Ball*, 1 Amer. Jurist, 297; Vattel, B. 2, §§ 76, 77; Rutherford, Inst. B. 2, ch. 9, § 12.

² *Com'th v. Deacon*, 10 Sergeant & Rawle, R. 125; 1 American Jurist, 297.

jected to any higher tax or excise than that exacted by law of such permanent residents. *State v. North et al.*, 27 Missouri, 467; *Fire Department v. Wright*, 8 E. D. Smith, 478; *Paul v. Virginia*, 8 Wall. 177.

"Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden and forbids discrimination in State taxation when the power is applied to citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the

grievances of the citizens under the confederation, and the new Constitution was adopted, among other things, to remedy those defects in the prior system.

"Evidence to show that the framers of the Constitution intended to remove those great evils in the government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress as well as the States is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear, or pay duties in another.

"Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each State possesses the power, in levying taxes for the support of its own government, to discriminate against the citizens of every other State of the Union."

(a) It is now settled that nations can only claim from each other the surrender of fugitives under treaty stipulations.

not uncommon for treaties to contain mutual stipulations for the surrender of criminals; and the United States have sometimes been a party to such an arrangement.¹

§ 1809. But, however the point may be as to foreign nations, it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the States, and it will increase the general sense of the blessings of the national government. It will, moreover, give strength to a great moral duty, which neighboring States especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character.²

§ 1810. The next clause is: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."³

§ 1811. This clause was introduced into the Constitution solely for the benefit of the slaveholding States, to enable them to reclaim their fugitive slaves who should have escaped into other States where slavery was not tolerated. The want of

¹ See treaty with Great Britain, of 1794, art. 27; *United States v. Nash*, Bee's Adm. R. 266.

² See 1 Kent's Comm. Lect. 2, p. 36 (2d edit. p. 36). See *Journ. of Convention*, 222, 304.

³ This clause, in its substance, was unanimously adopted by the Convention. *Journ. of Convention*, 307.

See case of *Jose Ferreira dos Santos*, 2 Brock. 493; *United States v. Davis*, 2 Sum. 482; *Matter of Metzger*, 5 How. 176. Many such treaties have been entered into by the United States. The

several States, it would seem, cannot now surrender fugitives to a foreign government. *Holmes v. Jennison*, 14 Pet. 540, per Taney, Ch. J.

such a provision, under the confederation, was felt as a grievous inconvenience by the slaveholding States;¹ since, in many States, no aid whatsoever would be allowed to the owners, and sometimes, indeed, they met with open resistance. In fact it cannot escape the attention of every intelligent reader, that many sacrifices of opinion and feeling are to be found, made by the eastern and middle States to the peculiar interests of the south. This forms no just subject of complaint; but it should forever repress the delusive and mischievous notion that the south has not at all times had its full share of benefits from the Union.

§ 1812. It is obvious that these provisions for the arrest and removal of fugitives of both classes contemplate summary ministerial proceedings, and not the ordinary course of judicial investigations, to ascertain whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy. In cases of suspected crimes, the guilt or innocence of the party is to be made out at his trial, and not upon the preliminary inquiry whether he shall be delivered up. All that would seem, in such cases, to be necessary is, that there should be *prima facie* evidence before the executive authority to satisfy its judgment that there is probable cause to believe the party guilty, such as upon an ordinary warrant would justify his commitment for trial.² And in the cases of fugitive slaves, there would seem to be the same necessity of requiring only *prima facie* proofs of ownership, without putting the party to a formal assertion of his rights by a suit at the common law. Congress appear to have acted upon this opinion; and accordingly, in the statute upon this subject, have authorized summary proceedings before a magistrate, upon which he may grant a warrant for removal.³ (a)

¹ 1 Tuck. Black. Comm. App. 366. See also Serg. on Const. ch. 31, p. 385 (ch. 33, pp. 394 to 398, 2d edit.); *Glen v. Hodges*, 9 Johns. R. 67; *Commonwealth v. Halloway*, 2 Serg. & Rawle, R. 306.

² See Serg. on Const. ch. 31, p. 385 (2d edit. ch. 33, p. 394); *Somerset's Case*, 20 State Trials, 79; 1 Black. Comm. 425, note; 3 B. & Ald. 353; 2 B. & Cressw. 448.

³ Act of 12th Feb. 1793, ch. 51 (ch. 7); Serg. on Const. ch. 31, p. 387 (2d edit. ch. 33, pp. 397, 398); *Glen v. Hodges*, 9 Johns. R. 62; *Wright v. Deacon*, 5 Serg. & R. 62; *Commonwealth v. Griffin*, 2 Pick. R. 11.

(a) This clause of the Constitution, though not repealed, became of little or no importance on the abolition of slavery. It was construed in *Prigg v. Pennsylvania*, 16 Pet. 608. See also *Jones v. Van Zandt*, 5 How. 215; *Moore v. People*, 14 How. 13.

New and more efficient provisions for the recovery of fugitive slaves were made by the act of September 18, 1850, but this created high political excitement, and led to much estrangement between the two sections of the country. The constitutionality of the act was denied in Wisconsin : *In re Booth*, 3 Wis. 1 ; but it was

affirmed by the Supreme Court of the United States in *Ableman v. Booth*, 21 How. 506, and also by the State courts generally. See particularly *Sim's Case*, 7 Cush. 285 ; and *Bushnell's Case*, 9 Ohio, N. S. 77. After the great rebellion broke out, all provisions for the restoration of fugitive slaves were repealed.

CHAPTER XLI.

GUARANTY OF REPUBLICAN GOVERNMENT—MODE OF MAKING
AMENDMENTS.

§ 1813. THE fourth section of the fourth article is as follows: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence." (a)

(a) The meaning and force of this guaranty were somewhat considered in connection with the Rhode Island difficulties in 1841-2. That State, in the early days of the republic, had found the colonial charter a sufficient constitution for its needs, and had retained and acted under it as such. But that charter contained restrictions upon the elective franchise which were not admitted in the other States, and for some time previous to the difficulties alluded to a strong party in the State had demanded a new constitution with a view particularly to extending the basis of suffrage. The legislature, however, resisted that demand, until at length a convention, called without legislative authority, but claiming to represent the sovereignty of the people, met and framed a constitution, which was submitted to a vote of those who, under its provisions, were to be electors, and was adopted by a majority of those voting. An attempt to put a government in operation under this constitution was resisted by the authorities acting under the charter, and the leader in it was arrested, tried, and punished as a criminal. See *Luther v. Borden*, 7 How. 1. The anti-republican restrictions upon the right of suffrage were supposed by some to warrant

the interference of the government of the United States, but this view was not accepted by any department of the government. See Mr. Webster's argument in this case, 6 Works, 617. And see *North American Review* for April, 1844, p. 371. Mr. Calhoun, in speaking of this guaranty with particular reference to the Rhode Island case, says that "the federal government, in determining whether the government of a State be or be not republican within the meaning of the Constitution, has no right whatever in any case to look beyond its admission into the Union. From this fundamental restriction, another, deduced from it, necessarily follows, of no little importance,—that no change in its government, after its admission, can make it other than republican which does not essentially alter its form, or make it different in some essential particular from those of the other States at the time of their adoption. In other words, the forms of the governments of the several States composing the Union, as they stood at the time of their admission, are the proper standard by which to determine whether any afterchange in any of them makes its form of government other than republican." 6 Works, 219. The view of Mr. Beverdy Johnson was

§ 1814. The want of a provision of this nature was felt as a capital defect in the plan of the confederation, as it might, in its

expressed in the debate in the Senate of the United States, December 14, 1867. "There must be some mode by which you are to ascertain whether any government is republican in point of form, for this very obvious consideration: the United States are to guarantee to every State a republican form of government. My friend from Massachusetts says, and my friend who offers this amendment says, that to exclude the black man from voting shows that the government is not republican in point of form. Why? Was he not excluded when the Constitution was adopted in every State in the Union, or almost every State in the Union? Yea. Did not the States that adopted it do it under the impression that they were States republican in point of form? Why certainly, unless they intended to break up all the States. That we know they did not intend; and not intending that, can it be supposed that they intended by this clause to place it in the hands of Congress to decide from time to time, as passions might be excited, party spirit prevail, the exigencies of party success demand, to interfere with the State governments by bringing into the enjoyment of the elective franchise those whom the States had excluded? Not only that; if the proposition is true, it goes a step further than that; if possible, infinitely further. Does it give to the United States the authority to interfere with any of the existing rights belonging to the States at the time they adopted the Constitution? If it did, then everything was thrown afloat; the United States, then, by its Congress, is to become a great convention, not only to deliberate for the interests and safety of the people of the United States, but for what they may from time to time believe to be the true interest and safety of the people of each State in the management of its own domestic concerns.

"There is a rule, and it is the only

rule, as I think, consistent with what must have been the intention of the convention and of the people, and that is this: that every government is republican in point of form which corresponds with the governments in existence when the Constitution was adopted. All rights secured by positive constitutional prohibitions, that were secured or prohibited in the several State constitutions of the States whose representatives framed the Constitution, and whose people adopted the Constitution, are perfectly consistent with our idea and the people's idea of what constitutes a republican form of government. There is no other rule by which you can construe the clause that will not place every State in the power of the United States, exercising that power through the Congress of the United States which from time to time that body may think actually or professedly will conduce to the interest of the people of each State, and give them what they consider a government republican in point of form."

This view, so forcibly presented, is that which was practically accepted and acted upon up to the time when it became necessary to reorganize and reconstruct State governments in the States which went into rebellion in 1861. By some leading men in Congress it was then contended that a government ought not to be regarded as republican in form which permitted slavery, or which excluded a portion of its citizens from participation in the government because of the color of the skin. The exigencies of the times made this doctrine acceptable. The reorganizing States were required to present constitutions forbidding slavery and establishing impartial suffrage. In the course of reconstruction, however, the question was warmly discussed whether, if the political departments of the government should erroneously, arbitrarily, and, for partisan ends, determine and declare

consequences, endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national gov-

that a particular State government was not republican in form, and therefore should not be recognized, such State or its citizens could have any appeal to the judicial tribunals. It was not doubted that, if the case was one of a newly-organized State applying for admission to the Union, the decision of Congress upon its admission, however erroneous, unjust, or arbitrary, would be one the conclusiveness of which would not be open to discussion. Congress having full power to admit or reject new States, the insufficiency of the reasons which may have governed its action cannot possibly affect its validity. But in other cases also it must be conceded that a State aggrieved by an unjust decision is equally without legal remedy. The courts cannot aid it, for upon political questions they must accept and follow the conclusions of the political department. *Luther v. Borden*, 7 How. 42; *Texas v. White*, 7 Wall. 700; *White v. Hart*, 13 Wall. 649. In such a case, the only redress possible is through an appeal to the people. Such is the conclusion of the cases above cited.

The recent case of Louisiana demonstrates that there may be greater wrongs than even the wrongful refusal of Congress to recognize the legitimate government of a State, and yet no speedy and effectual remedy be attainable. Such action on the part of Congress would at least be that of a proper authority, and would imply deliberation, and be supported by a presumption of due regard for the public good and for the supremacy of the law. But in the case of Louisiana in 1873, an inferior federal judge, without a shadow of authority, and consequently in defiance of law, and for that reason supported by no presumption of correct motives, and with scarcely a pretence of observing even the usual forms, by the process of his court, aided by a military force, installed in power a State government which he sided with as against rival claimants, and

in consequence of a pressure of business in Congress precluding prompt attention to the case by that body, has been enabled to sustain this government in power until the present time. Mr. Justice Story has with reason predicted that "if a despotic or monarchical government were established in one State it would bring on the ruin of the whole republic." What government can be more despotic than one elected by an injunction, and continued in power by a military force under the order of a judge who, having no jurisdiction, is restrained by no law but his own arbitrary will? For the facts of this unparalleled wrong we refer to reports made by the judiciary committee of the United States Senate in February, 1873. The case requires no further comment than it there receives. The dullest mind cannot fail to see that the facility with which the wrong is committed, and the possible immediate advantages which individuals may derive therefrom, present constant temptations to its repetition, and if suffered to pass once unrebuked, a precedent will be tacitly assented to which cannot fail to threaten constant danger to our liberties, especially at those very periods of high political excitement when prudence, caution, and the strictest regard for the Constitution and the laws are most important. What party or what political leader can at such times be expected to pay scrupulous deference to the laws, if a judge may ignore them with impunity? It was thought the climax of wrong had been reached when a local judge in one of the States could seize upon the property of individuals and corporations through his injunctions and mandates, and plunder them through receivers; but he at least was not acting wholly without jurisdiction; and if he seized property, he did not venture to go so far as to make the liberties of the people the subject of a receivership. C.

ernment, in repelling domestic dangers which might threaten the existence of the State constitutions, could not be demanded as a right from the national government. Usurpation might raise its standard, and trample upon the liberties of the people, while the national government could legally do nothing more than behold the encroachments with indignation and regret. A successful faction might erect a tyranny on the ruins of order and law; while no succor could be constitutionally afforded by the Union to the friends and supporters of the government.¹ But this is not all. The destruction of the national government itself, or of neighboring States, might result from a successful rebellion in a single State. Who can determine what would have been the issue, if the insurrection in Massachusetts in 1787 had been successful, and the malcontents had been headed by a Cæsar or a Cromwell?² If a despotic or monarchical government were established in one State, it would bring on the ruin of the whole republic. Montesquieu has acutely remarked, that confederated governments should be formed only between States whose form of government is not only similar, but also republican.³

§ 1815. The Federalist has spoken with so much force and propriety upon this subject, that it supersedes all further reasoning.⁴ "In a confederacy," says that work, "founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained."

§ 1816. "But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. 'As the confederate republic of Germany,' says Montesquieu, 'consists of free cities and petty states,

¹ The Federalist, No. 21.

² Ibid.

³ Montesq. B. 9, ch. 1, 2; 1 Tuck. Black. Comm. App. 366, 367. This clause of guaranty was unanimously adopted in the convention. Journ. of Convention, 113, 189.

⁴ The Federalist, No. 21.

subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland.' 'Greece was undone,' he adds, 'as soon as the king of Macedon obtained a seat among the Amphictyons.' In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events.

§ 1817. "It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority it will be of course bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions, — a restriction which, it is presumed, will hardly be considered as a grievance.

§ 1818. "A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State not only against foreign hostility but against ambitious or vindictive enterprises of its more powerful neighbors. The history both of ancient and modern confederacies proves that the weaker members of the Union ought not to be insensible to the policy of this article.

§ 1819. "Protection against domestic violence is added with equal propriety. It has been remarked that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of

that league informs us that mutual aid is frequently claimed and afforded, and as well by the most democratic as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

§ 1820. "At first view, it might seem not to square with the republican theory to suppose, either that a majority have not the right or that a minority will have the force to subvert a government, and consequently that the federal interposition can never be required but when it would be improper. But theoretic reasoning in this as in most other cases must be qualified by the lessons of practice. Why may not illicit combinations for purposes of violence be formed as well by a majority of a State, especially a small State, as by a majority of a county or a district of the same State? and if the authority of the State ought in the latter case to protect the local magistracy, ought not the federal authority in the former to support the State authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose will generally prevent the necessity of exerting it.

§ 1821. "Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of *citizens* may become a majority of *persons* by the accession of alien residents, of a casual concourse of adventurers, or of those

whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men, but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

§ 1822. "In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions flying to arms and tearing the State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges they would unite the affection of friends. Happy would it be, if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!

§ 1823. "Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? — the answer must be that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal constitution that it diminishes the risk of a calamity for which no possible constitution can provide a cure.

§ 1824. "Among the advantages of a confederate republic, enumerated by Montesquieu, an important one is, 'that should a popular insurrection happen in one of the States the others are able to quell it. Should abuses creep into one part they are reformed by those that remain sound.'"¹

§ 1825. It may not be amiss further to observe (in the language of another commentator) that every pretext for intermeddling with the domestic concerns of any State, under color of protecting it against domestic violence, is taken away by that part of the provision which renders an application from the legislature or executive authority of the State endangered necessary to be made to the general government before its interference can be at all proper. (a) On the other hand, this

¹ The Federalist, No. 43.

(a) The danger from this clause, if legislature or executive obtaining federal any, will probably come from a spurious recognition, and by means thereof secur-

article becomes an immense acquisition of strength and additional force to the aid of any State government in case of an internal rebellion or insurrection against lawful authority. The southern states, being more peculiarly open to danger from this quarter, ought, he adds, to be particularly tenacious of a constitution from which they may derive such assistance in the most critical periods.¹

§ 1826. The fifth article of the Constitution respects the mode of making amendments to it. It is in these words: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."²

§ 1827. Upon this subject, little need be said to persuade us at once of its utility and importance. It is obvious that no human government can ever be perfect; and that it is impossible to foresee or guard against all the exigencies which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become

¹ 1 Tuck. Black. Comm. App. 367. See also Rawle on Const. ch. 32; 2 Elliot's Debates, 118, 119, 120; Journal of Convention, pp. 229, 311, 312.

² See Journal of Convention, 113; Id. 229, 313, 347, 348, 366, 386, 387, 388.

ing federal interference to enable them to seize upon the authority of the State. Dangers of the kind are now (1891) lurking; several of the States, older as well as newer, are in difficulties about either the legislative or the executive branch of

government, or both. But good sense is too characteristic of the American people not to save them from a renewal of experiences the effects of which have not yet become a memory altogether.

wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism or, by the pressure of its inequalities, bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering and improving the fabric of government, as time and experience or the new phases of human affairs may render proper to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation and caution; and to follow experience, rather than to open a way for experiments suggested by mere speculation or theory.

§ 1828. In regard to the Constitution of the United States, it is confessedly a new experiment in the history of nations. Its framers were not bold or rash enough to believe or to pronounce it to be perfect. They made use of the best lights which they possessed to form and adjust its parts and mould its materials. But they knew that time might develop many defects in its arrangements and many deficiencies in its powers. They desired that it might be open to improvement; and, under the guidance of the sober judgment and enlightened skill of the country, to be perpetually approaching nearer and nearer to perfection.¹ It was obvious, too, that the means of amendment might avert, or at least have a tendency to avert, the most serious perils to which confederated republics are liable, and by which all have hitherto been shipwrecked. They knew that the besetting sin of republics is a restlessness of temperament and a spirit of discontent at slight evils. They knew the pride and jealousy of State power in confederacies, and they wished to disarm them of their potency by providing a safe means to break the force, if not wholly to ward off the blows, which would from time to time, under the garb of patriotism or a love of the people, be aimed at the Constitution. They believe that the power of amendment was, if one may so say, the safety-valve to let off all temporary effervescences and excitements, and the real effective instrument to control and adjust the movements of the machinery when out of order or in danger of self-destruction.

§ 1829. Upon the propriety of the power in some form there will probably be little controversy. The only question is, whether it is so arranged as to accomplish its objects in the

¹ The Federalist, No. 43.

safest mode, — safest for the stability of the government, and safest for the rights and liberties of the people.

§ 1830. Two modes are pointed out, the one at the instance of the government itself, through the instrumentality of Congress; the other at the instance of the States, through the instrumentality of a convention. Congress, whenever two-thirds of each house shall concur in the expediency of an amendment, may propose it for adoption.¹ The legislatures of two-thirds of the States may require a convention to be called for the purpose of proposing amendments. In each case, three-fourths of the States, either through their legislatures or conventions, called for the purpose, must concur in every amendment before it becomes a part of the Constitution. That this mode of obtaining amendments is practicable, is abundantly demonstrated by our past experience in the only mode hitherto found necessary, that of amendments proposed by Congress. In this mode twelve amendments have already been incorporated into the Constitution. The guards, too, against the too hasty exercise of the power, under temporary discontents or excitements, are apparently sufficient. Two-thirds of Congress, or the legislatures of the States, must concur in proposing, or requiring amendments to be proposed; and three-fourths of the States must ratify them. Time is thus allowed and ample time for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action. An amendment, which has the deliberate judgment of two-thirds of Congress, and of three-fourths of the States, can scarcely be deemed unsuited to the prosperity or security of the republic. It must combine as much wisdom and experience in its favor as ordinarily can belong to the management of any human concerns.²

¹ It has been held that the approval of the President is not necessary to any amendment proposed by Congress. *Hollingsworth v. Virginia*, 3 Dall. 378.

² The *Federalist* disposes of this article in the following brief but decisive manner: "That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors as they may be pointed out by the experi-

In England the supreme power of the nation resides in Parliament; and in a legal sense, it is so omnipotent that it has authority to change the whole structure of the constitution without resort to any confirmation of the people. There is, indeed, little danger that it will so do, as long as the people are fairly represented in it. But still it does, theoretically speaking, possess the power; and it has actually exercised it so far as to change the succession to the crown, and mould to its will some portions of the internal structure of the constitution.¹

§ 1831. Upon the subject of the national Constitution, we may adopt, without hesitation, the language of a learned commentator. "Nor," says he, "can we too much applaud a constitution which thus provides a safe and peaceable remedy for its own defects, as they may from time to time be discovered. A change of government in other countries is almost always attended with convulsions which threaten its entire dissolution, and with scenes of horror which deter mankind from every attempt to correct abuses or remove oppressions until they have become altogether intolerable. In America we may reasonably hope that neither of these evils need be apprehended. Nor is there any reason to fear that this provision in the Constitution will produce any instability in the government. The mode both of originating and ratifying amendments (in either mode which the Constitution directs) must necessarily be attended with such obstacles and delays as must prove a sufficient bar against light or frequent innovations. And as a further security against them, the same article further provides that no amendment which may be made prior to the year 1808 shall in any manner affect those clauses of the ninth section of the first article which relate to the migration or importation of such persons as the States may think proper to allow, and to the manner in which direct taxes shall be laid, and that no State shall, without its consent, be deprived of its equal suffrage in the Senate."²

ence on one side or the other. The exception, in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature, and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it." *The Federalist*, No. 43.

¹ See 1 Black. Comm. 90, 91, 146, 147, 151, 152, 160, 161, 162, 210 to 218.

² 1 Tuck. Black. Comm. App. 371, 372.

CHAPTER XLII.

PUBLIC DEBT — SUPREMACY OF CONSTITUTION AND LAWS.

§ 1832. THE first clause of the sixth article of the Constitution is: "All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation."¹

§ 1833. This can be considered in no other light than as a declaratory proposition resulting from the law of nations and the moral obligations of society. Nothing is more clear upon reason or general law than the doctrine that revolutions in government have, or rather ought to have, no effect whatsoever upon private rights and contracts, or upon the public obligations of nations.² It results from the first principles of moral duty and responsibility, deducible from the law of nature, and applied to the intercourse and social relations of nations.³ A change in the political form of a society ought to have no power to produce a dissolution of any of its moral obligations.⁴

§ 1834. This declaration was probably inserted in the Constitution not only as a solemn recognition of the obligations of the government resulting from national law, but for the more complete satisfaction and security of the public creditors, foreign as well as domestic. The articles of confederation contained a similar stipulation in respect to the bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress before the ratification of the confederation.⁵

§ 1835. Reasonable as this provision seems to be, it did not

¹ See Journ. of Convention, 291.

² See *Jackson v. Lunn*, 3 Johns. Cas. 109; *Kelly v. Harrison*, 2 Johns. Cas. 29; *Terrett v. Taylor*, 9 Cranch, 50.

³ See Rutherford, *Inst. B.* 2, ch. 9, §§ 1, 2; *Id.* ch. 10, § 14; Vattel, *Prelim. Dia.* §§ 2, 9; *B.* 2, ch. 1, § 1, ch. 5, § 64, ch. 14, §§ 214, 215, 216.

⁴ The *Federalist*, No. 43; Rutherford, *Inst. B.* 2, ch. 10, §§ 14, 15; Grotius, *B.* 2, ch. 9, §§ 8, 9.

⁵ 1 Tuck. *Black. Comm. App.* 368; *Confederation*, Art. 12.

wholly escape the animadversions of that critical spirit which was perpetually on the search to detect defects and to disparage the merits of the Constitution. It was said that the validity of all engagements made *to* as well as made *by* the United States ought to have been expressly asserted. It is surprising that the authors of such an objection should have overlooked the obvious consideration that as all engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves their validity on the other, and that, as this article is but declaratory, the establishment of it in debts entered into by the government unavoidably included a recognition of it in engagements with the government.¹ The shorter and plainer answer is that pronounced by the law of nations, that states neither lose any of their rights nor are discharged from any of their obligations by a change in the form of their civil government.² More was scarcely necessary than to have declared that all future contracts by and with the United States should be valid and binding upon the parties.

§ 1836. The next clause is: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. (a) And the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."³ (b)

§ 1837. The propriety of this clause would seem to result from the very nature of the Constitution. If it was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet that in the exercise of those powers it should not be supreme. What other inference could have been drawn

¹ The Federalist, Nos. 43, 84.

² The Federalist, No. 84; Rutherford, B. 2, ch. 10, §§ 14, 15; Grotius, B. 2, ch. 9, §§ 8, 9.

³ See Journal of Convention, pp. 222, 282, 293.

(a) See *Edye v. Robertson*, 112 U. S. Wall. 211; *Cherokee Tobacco*, 11 Wall. 580. A treaty with the Indians may work the effect of legislation. *Ex parte Kang-gi-shun-ca*, 109 U. S. 556; *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188. See also *Holden v. Joy*, 17

616. (b) See *Cook v. Moffat*, 5 How. 295; *Dodge v. Woolsey*, 18 How. 341; *Sinnot v. Davenport*, 22 How. 327.

than of their supremacy if the Constitution had been totally silent? And surely a positive affirmance of that which is necessarily implied cannot, in a case of such vital importance, be deemed unimportant. The very circumstance that a question might be made, would irresistibly lead to the conclusion that it ought not to be left to inference. A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another name for political power and supremacy. But it will not follow that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. They will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the above clause only declares a truth which flows immediately and necessarily from the institution of a national government.¹ It will be observed that the supremacy of the laws is attached to those only which are made in pursuance of the Constitution,—a caution very proper in itself; but in fact the limitation would have arisen by irresistible implication if it had not been expressed.²

§ 1838. In regard to treaties, there is equal reason why they should be held, when made, to be the supreme law of the land. It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited

¹ The Federalist, No. 33. See *Gibbons v. Ogden*, 9 Wheat. R. 210, 211; *M'Culloch v. Maryland*, 4 Wheat. R. 405, 406. This passage from the Federalist (No. 33) has been, for another purpose, already cited in vol. I. § 340; but it is necessary to be here repeated to give due effect to the subsequent passages.

² Ibid. See also 1 Tuck. Black. Comm. App. 369, 370.

by reprisals or war.¹ It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. This will not prevent them from being cancelled or abrogated by the nation upon grave and suitable occasions; for it will not be disputed that they are subject to the legislative power, and may be repealed, like other laws, at its pleasure,² (a) or they may be varied by new treaties. Still, while they do subsist, they ought to have a positive binding efficacy as laws upon all the States and all the citizens of the States. The peace of the nation, and its good faith, and moral dignity indispensably require that all State laws should be subjected to their supremacy. The difference between considering them as laws and considering them as executory or executed contracts, is exceedingly important in the actual administration of public justice. If they are supreme laws, courts of justice will enforce them directly in all cases to which they can be judicially applied, in opposition to all State laws, as we all know was done in the case of the British debts secured by the treaty of 1783, after the Constitution was adopted.³ If they are deemed but solemn compacts, promissory in their nature and obligation, courts of justice may be embarrassed in enforcing them, and may be compelled to leave the redress to be administered through other departments of the government.⁴ It is noto-

¹ See *The Federalist*, No. 64.

² See Act of Congress, 7th July, 1798, ch. 84; *Talbot v. Seeman*, 1 Cranch, 1; *Ware v. Hylton*, 3 Dall. 361, per Iredell, J.; *Taylor v. Morton*, 2 Curtis, C. C. 454.

³ *Ware v. Hylton*, 3 Dall. R. 199. See also *Gibbons v. Ogden*, 9 Wheat. R. 210, 211; Letter of Congress of 18th April, 1787, 12 Journ. of Congress, 32.

⁴ See Iredell, J.'s reasoning in *Ware v. Hylton*, 3 Dall. R. 270 to 277; 5 Marshall's Life of Washington, ch. 8, pp. 652, 656; 1 Wait's State Papers, 45, 47, 71, 81, 145; Serg. on Const. ch. 21, pp. 217, 218, ch. 33, pp. 396, 397 (2d edit. ch. 21, pp. 218, 219, ch. 34, pp. 406, 407). "A treaty," said the Supreme Court, in *Foster v. Neilson*, 2 Peters's R. 314, "is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded by courts of justice as equivalent to an act

(a) An act of Congress may supersede a prior treaty. *Taylor v. Morton*, 2 Curtis, 454; *The Clinton Bridge*, 1 Woolw. 155; *Ropes v. Church*, 8 Blatch. 304;

The Cherokee Tobacco, 11 Wall. 616. And on the other hand, a treaty may supersede a prior act of Congress. *Foster v. Neilson*, 2 Pet. 314.

rious that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the States under the confederation. They were deemed by the States not as laws, but like requisitions of mere moral obligation, and dependent upon the good-will of the States for their execution. Congress, indeed, remonstrated against this construction, as unfounded in principle and justice.¹ But their voice was not heard. Power and right were separated; the argument was all on one side, but the power was on the other.² It was probably to obviate this very difficulty that this clause was inserted in the Constitution;³ and it would redound to the immortal honor of its authors if it had done no more than thus to bring treaties within the sanctuary of justice, as laws of supreme obligation.⁴ There are, indeed, still cases in which courts of justice can administer no effectual redress; for when the terms of a stipulation import a contract, as when either of the parties engages to perform a particular act, the treaty addresses itself to the political, and not to the judicial department; and the legislature must execute the contract before it can become a rule for the courts.⁵

§ 1839. It is melancholy to reflect that conclusive as this view of the subject is in favor of the supremacy clause, it was assailed with great vehemence and zeal by the adversaries of the Constitution, and especially the concluding clause which declared the supremacy, "anything in the Constitution or laws of any State to the contrary notwithstanding."⁶ And yet this very clause was but an expression of the necessary meaning of the former clause, introduced from abundant caution to make its obligation more

of the legislature whenever it operates of itself without the aid of any legislative provision."

¹ Circular Letter of Congress, 13th April, 1787; 12 Journ. of Congress, 32 to 36.

² See the opinion of Iredell, J., in *Ware v. Hylton*, 3 Dall. 270 to 277.

³ *Id.* 276, 277. See Journal of Convention, pp. 222, 282, 283, 293.

⁴ The importance of this power has been practically illustrated by the redress afforded by courts of law in cases pending before them upon treaty stipulations. See *United States v. The Peggy*, 1 Cranch, 108; *Ware v. Hylton*, 3 Dall. R. 199, 244, 261; *United States v. Arredondo*, 6 Peters's R. 691; *Soulard v. Smith*, 4 Peters's Sup. R. 511; *Case of Jonathan Robbins*, 1 Hall's Journ. of Jurisp. 25; *Bee's Adm. Rep.* 263; 5 Wheat. Rep. App.

⁵ *Foster v. Neilson*, 2 Peters's Sup. Ct. R. 254, 314. See also *The Bello Corunnes*, 6 Wheat. R. 171; *Serg. on Const.* ch. 33, pp. 397, 398, 399 (ch. 34, pp. 407, 408, 409, 410, 2d edit.)

⁶ See *The Federalist*, Nos. 44, 64.

strongly felt by the State judges. The very circumstance that any objection was made demonstrated the utility, nay, the necessity of the clause, since it removed every pretence under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the Constitution.

§ 1840. To be fully sensible of the value of the whole clause, we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor. "In the first place, as these constitutions invest the State legislatures with absolute sovereignty in all cases not excepted by the existing articles of confederation, all the authorities contained in the proposed constitution, so far as they exceed those enumerated in the confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors. In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power contained in the proposed constitution. In the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others. In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."¹

§ 1841. At an early period of the government, a question arose how far a treaty could embrace commercial regulations, so as to be obligatory upon the nation and upon Congress. It was debated with great zeal and ability in the House of Representatives.² On the one hand, it was contended that a treaty might be made respecting commerce as well as upon any other subject; that it

¹ The Federalist, No. 44.

² The question arose in the debate for carrying into effect the British Treaty of 1794.

was a contract between the two nations, which, when made by the President, by and with the consent of the Senate, was binding upon the nation; and that a refusal of the House of Representatives to carry it into effect was breaking the treaty, and violating the faith of the nation. On the other hand, it was contended that the power to make treaties, if applicable to every object, conflicted with powers which were vested exclusively in Congress; that either the treaty-making power must be limited in its operation, so as not to touch objects committed by the Constitution to Congress, or the assent and co-operation of the House of Representatives must be required to give validity to any compact, so far as it might comprehend these objects; that Congress was invested with the exclusive power to regulate commerce; that, therefore, a treaty of commerce required the assent and co-operation of the House of Representatives; that in every case where a treaty required an appropriation of money, or an act of Congress to carry it into effect, it was not in this respect obligatory till Congress had agreed to carry it into effect, and that they were at free liberty to make or withhold such appropriation or act without being chargeable with violating the treaty or breaking the faith of the nation. In the result, the House of Representatives adopted a resolution declaring that the House of Representatives do not claim any agency in making treaties; but when a treaty stipulates regulations on any of the subjects submitted to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress, and that it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as in their judgment may be most conducive to the public good. It is well known that the President and the Senate, on that occasion, adopted a different doctrine, maintaining that a treaty once ratified became the law of the land, and Congress were constitutionally bound to carry it into effect.¹ At the dis-

¹ See Journal of House of Representatives, 6th April, 1796; 5 Marshall's Life of Washington, ch. 8, pp. 650 to 659; Serg. on Const. ch. 33, p. 401 (2d edit. ch. 34, pp. 410, 411); 1 Debates on British Treaty, by F. Bache, 1796, pp. 374 to 386; 4 Elliot's Deb. 244 to 248. President Washington, on this occasion, refused to deliver the papers respecting the British Treaty of 1794, called for by the House of Representatives, and asserted the obligatory force of the treaty upon Congress in the most em-

tance of twenty years, the same question was again presented for the consideration of both houses, upon a bill to carry into effect a clause in the treaty of 1815 with Great Britain, abolishing discriminating duties, and upon that occasion it was most ably debated. The result was, that a declaratory clause was adopted instead of a mere enacting clause, so that the binding obligation of treaties was affirmatively settled.¹ (a)

phatic terms. He added, that he knew that this was understood in the convention to be the intended interpretation, and he referred to the Journal of the Convention (see Journal of Convention, pp. 284, 325, 326, 339, 342, 343), to show that a proposition was made, "that no treaty should be binding on the United States which was not ratified by a law," and that it was explicitly rejected. 5 Marshall's Life of Washington, ch. 8, pp. 654 to 658. At a much earlier period, viz., in 1790, the same point came before the cabinet of President Washington, in a treaty proposed with the Creek Indians. Upon that occasion there seems to have been no doubt in the minds of any of his cabinet of the conclusiveness of a treaty containing commercial stipulations. Mr. Jefferson, on that occasion, firmly maintained it. A treaty, said he, made by the President with the concurrence of two-thirds of the Senate is the law of the land, and a law of a superior order, because it not only repeals past laws, *but cannot itself be repealed by future ones*. The treaty, then, will legally control the duty act, and the act for securing traders in this particular instance. Yet Mr. Jefferson afterwards (in Nov. 1793) seems to have fluctuated in opinion, and to have been unsettled as to the nature and extent of the treaty-making power. 4 Jefferson's Corresp. 497, 498.

¹ Serg. on Const. ch. 33, p. 402 (2d edit. ch. 34, p. 411); 2 Elliot's Deb. 273 to 279. Upon this occasion a most admirable speech was delivered by the late William Pinkney, in which his great powers of reasoning and juridical learning had an ample scope. See Wheaton's Life of Pinkney, p. 517.

(a) Mr. Wheaton says of the resolution of the House of Representatives upon Mr. Jay's treaty of 1794, disclaiming the power of interfering in the making of treaties, but asserting its right, whenever stipulations were made within the legislative competence of Congress, to deliberate and decide as to the expediency of carrying them into effect: "Such is certainly the practice in other constitutional governments, — as in England, where the commercial articles of the Treaty of Utrecht with France, though duly made and ratified by the crown, remained unexecuted because Parliament refused to pass the laws necessary to give effect to their provisions. So also in France, as we have seen by the recent example of the treaty of indemnities with the United States,

the Chambers assert the right of controlling, by their votes, the appropriations of money or other specific legislative provisions which may be required to carry into effect treaties concluded by the crown with foreign powers." Life of Pinkney, 517, 518; Sparks's American Biography, vol. 6, p. 54. The same position was again taken in the House of Representatives, in the administration of President Johnson, when an appropriation to carry into effect the treaty for the purchase of Alaska was called for; and though the appropriation was made, it is not very clear that the House conceded the point of their obligation to make it against their own judgment.

Mr. George M. Dallas has an interesting letter on this subject, written while

§ 1842. From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional

minister in England, May 21, 1860, in answer to a question by Mr. C. J. Ingersoll, "Is there in the making of leagues or treaties a clearly defined line between the prerogative of the crown and the power of Parliament?" Mr. Dallas replies:—

"Without undertaking a full and minute course of discrimination, let me give you my impressions.

"What is called 'the tendency of the age' shows itself strikingly on this subject. The great commentator of last century may have been accurate; he would require liberalization now. He told us that whatever international contracts the sovereign engaged in, 'no other power in the kingdom can legally delay, resist, or annul.' That *dictum*, in its broad import, has ceased to be true. The impeachment of a bad minister is no longer the only recognized escape or remedy of an injurious treaty.

"The commercial convention recently entered into with France contains an express declaration that it shall not be valid unless 'her Britannic Majesty shall be authorized by the assent of her Parliament to execute the engagements contracted by her in its several articles.' Such a clause is, I am assured, always introduced in modern treaties of this kind: and before the present occasion its exigency was met by the adoption of a joint address to the Queen approving comprehensively the diplomatic programme.

"I believe it safe to say, nowadays, that a treaty which calls for a law in order to be executed, may be constitutionally nullified by the refusal of either house, the Commons or the Lords, to enact that law. If it be necessary to *assent*, it is competent to *dissent*. Treaties requiring appropriations of money; treaties establishing tariffs or mutual terms of interchanging products; and treaties relinquishing territorial dominions, perhaps,

sink into the power of Parliament. In the olden time, Blackstone would have been shocked if the executive, bent upon fulfilling an international engagement, had thought it worth while to say more than 'Pass the bill.' *Stet pro ratione voluntas!*

"It may be doubted whether the check upon executive discretion be not, in this sphere of public agency, better ascertained here than with us. Chancellor Kent, I think, expressed astonishment and regret that a resolution, founded on the incidents of Jay's Treaty, was passed by the House of Representatives in 1796, declaring what is now understood to be settled English law and practice; that is, if a treaty depend for the execution of any of its stipulations upon a legislative act, the House could and should determine on the expediency of carrying it into effect or letting it abort. Whether the principle of that resolution was abandoned, or only pretermitted on the emergency of 1816, may be questioned. It disappoints expectation, but in reality is not illogical, that the treaty-making power, when in the hands of a hereditary monarch, should be more trammelled and restricted than when in the hands of an elective chief magistrate and senate. I trust, however, that, should the controversy revive, our representatives may feel themselves, maugre Chancellor Kent, free to be at least as democratic as the British Commons. It is noticeable that the precedent of a parliamentary stand against a treaty was made during the ministry of Pitt, almost contemporaneously with Jay's; and that while on this side of the Atlantic the popular resistance triumphed, by leading to the withdrawal and abandonment of the measure, on our side, notwithstanding an agitation alike universal and violent, we were compelled to swallow, pure and undiluted, the strong concoction of the venerable chief jus-

scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the national or State governments exceeds its constitutional functions.¹ But the judiciary of the United States has no general jurisdiction to declare acts of the several States void, unless they are repugnant to the Constitution of the United States, notwithstanding they are repugnant to the State constitution.² Such a power belongs to it only when it sits to administer the local law of a State, and acts exactly as a State tribunal is bound to act.³ But upon this subject it seems unnecessary

¹ *Marbury v. Madison*, 1 Cranch, 137, 176.

² *Calder v. Bull*, 3 Dall. R. 386.

³ *Satterlee v. Matthewson*, 2 Peters's Sup. R. 380, 418.

tice." Dallas's Letters from London, II. 208.

Mr. Todd, in his valuable work on Parliamentary Government in England, I. 610, states the rule as follows: "The constitutional power appertaining to Parliament in respect to treaties is limited. It does not require their formal sanction or ratification by Parliament as a condition of their validity. The proper jurisdiction of Parliament in such matters may be thus defined: First, it has the right to give or withhold its sanction to those parts of a treaty that require a legislative enactment to give it force and effect, as, for example, when it provides for an alteration in the criminal or municipal law, or proposes to change existing tariffs or commercial regulations. Secondly, either house has the right to express to the crown, by means of an address, its opinion in regard to any treaty or part of a treaty that has been laid before Parliament. Thirdly, it is in the power of either house, if it disapproves of a convention or treaty, to visit the ministers of the crown who are responsible for the same with censure or impeachment, as the case may be.

"If a treaty requires legislative action, in order to carry it out, it should be sub-

jected to the fullest discussion in Parliament, and especially in the House of Commons, with a view to enable the government to promote effectually the important interests at stake in their proposed alterations in the foreign policy of the nation. But while Parliament may refuse to agree to measures submitted to them for the purpose of giving effect to any treaty, they have no power to change or modify in any way a treaty itself."

Very much may be said on both sides of this question; but if the House, which, under the Constitution, is to originate appropriations, is under a moral obligation to pass acts to carry into effect all treaties, it is easy to conceive of cases in which the President and Senate, by agreeing in treaties to appropriations which ought to be made in the ordinary way, may encroach seriously upon the power of the House.

Though a treaty is the "law of the land," it is as much subject to repeal as any legislative act, and a subsequent act of Congress conflicting with it has the effect to repeal it *pro tanto*. *Taylor v. Morton*, 2 Curt. C. C. 454; *Ropes v. Church*, 8 Blatch. 304; *Gray v. Clinton Bridge*, 1 Woolw. 150; *United States v. Tobacco Factory*, 1 Dillon, 264, affirmed *sub nom.* *The Cherokee Tobacco*, 11 Wall. 616. C.

to dwell, since the right of all courts, State as well as national, to declare unconstitutional laws void, seems settled beyond the reach of judicial controversy.¹

¹ See Serg. on Const. ch. 33, p. 391 (2d edit. ch. 34, p. 401) ; 1 Kent's Comm. Lect. 30, pp. 420, 421 (2d edit. pp. 448, 449, 450).

CHAPTER XLIII.

OATHS OF OFFICE — RELIGIOUS TEST — RATIFICATION OF
CONSTITUTION.

§ 1843. THE next clause is, "The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support the Constitution.¹ But no religious test shall ever be required as a qualification to any office or public trust under the United States."

§ 1844. That all those who are entrusted with the execution of the powers of the national government should be bound by some solemn obligation to the due execution of the trusts reposed in them and to support the Constitution, would seem to be a proposition too clear to render any reasoning necessary in support of it. It results from the plain right of society to require some guaranty from every officer that he will be conscientious in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those who feel a deep sense of accountability to a Supreme Being. If, in the ordinary administration of justice in cases of private rights or personal claims, oaths are required of those who try as well as of those who give testimony, to guard against malice, falsehood, and evasion, surely like guards ought to be interposed in the administration of high public trusts, and especially in such as may concern the welfare and safety of the whole community. But there are known denominations of men who are conscientiously scrupulous of taking oaths (among which is that pure and distinguished sect of Christians, commonly called Friends or Quakers), and therefore, to prevent any unjustifiable exclusion

¹ This clause, requiring an oath of the State and national functionaries to support the Constitution, was at first carried by a vote of six States against five; but it was afterwards unanimously approved. *Journal of Convention*, pp. 114, 197. On the final vote it was adopted by a vote of eight States against one, two being divided. *Id.* 313. The clause respecting a religious test was unanimously adopted. *Id.* 313.

from office, the Constitution has permitted a solemn affirmation to be made instead of an oath, and as its equivalent.

§ 1845. But it may not appear to all persons quite so clear why the officers of the State governments should be equally bound to take a like oath or affirmation; and it has been even suggested that there is no more reason to require that than to require that all of the United States officers should take an oath or affirmation to support the State constitutions. A moment's reflection will show sufficient reasons for the requisition of it in the one case, and the omission of it in the other. The members and officers of the national government have no agency in carrying into effect the State constitutions. The members and officers of the State governments have an essential agency in giving effect to the national Constitution. The election of the President and the Senate will depend in all cases upon the legislatures of the several States; and, in many cases, the election of the House of Representatives may be affected by their agency. The judges of the State courts will frequently be called upon to decide upon the Constitution and laws and treaties of the United States, and upon rights and claims growing out of them. Decisions ought to be, as far as possible, uniform; and uniformity of obligation will greatly tend to such a result. The executive authority of the several States may be often called upon to exert powers or allow rights given by the Constitution, as in filling vacancies in the Senate during the recess of the legislature; in issuing writs of election to fill vacancies in the House of Representatives; in officering the militia, and giving effect to laws for calling them; and in the surrender of fugitives from justice. These and many other functions devolving on the State authorities render it highly important that they should be under a solemn obligation to obey the Constitution. In common sense, there can be no well-founded objection to it. There may be serious evils growing out of an opposite course.¹ One of the objections taken to the articles of confederation by an enlightened State (New Jersey) was, that no oath was required of members of Congress previous to their admission to their seats in Congress. The laws and usages of all civilized nations, said

¹ The Federalist, No. 44; 1 Tuck. Black. Comm. App. 370, 371; Rawle on Const. ch. 19, pp. 191, 192.

that State, evince the propriety of an oath on such occasions; and the more solemn and important the deposit, the more strong and explicit ought the obligation to be.¹

§ 1846. As soon as the Constitution went into operation, Congress passed an act,² prescribing the time and manner of taking the oath, or affirmation, thus required, as well by officers of the several States as of the United States. On that occasion, some scruple seems to have been entertained by a few members of the constitutional authority of Congress to pass such an act.³ But it was approved without much opposition. At this day, the point would be generally deemed beyond the reach of any reasonable doubt.⁴

§ 1847. The remaining part of the clause declares, that "no religious test shall ever be required as a qualification to any office or public trust under the United States." This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons who feel an invincible repugnance to any religious test or affirmation. It had a higher object, — to cut off forever every pretence of any alliance between church and state in the national government. The framers of the Constitution were fully sensible of the dangers from this source marked out in the history of other ages and countries, and not wholly unknown to our own. They knew that bigotry was unceasingly vigilant in its stratagems to secure to itself an exclusive ascendancy over the human mind, and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those who doubted its dogmas or resisted its infallibility. The Catholic and the Protestant had alternately waged the most ferocious and unrelenting warfare on each other; and Protestantism itself, at the very moment that it was proclaiming the right of private judgment, prescribed boundaries to that right, beyond which if any one dared to pass he must seal his rashness with the blood of martyrdom.⁵ The history of the parent country, too, could not fail to instruct them in the uses and the abuses of religious tests. They there found the pains and penalties of

¹ 2 Pitk. Hist. 22; 1 Secret Journal of Congress, June 25, 1778, p. 374.

² Act of 1st June, 1789, ch. 1.

³ Lloyd's Debates, 218 to 225; 4 Elliot's Debates, 139 to 141.

⁴ See also *M'Culloch v. Maryland*, 4 Wheat. R. 415, 416.

⁵ See 4 Black. Comm. 44, 53, and *ante*, vol. i. § 53.

nonconformity written in no equivocal language, and enforced with a stern and vindictive jealousy. One hardly knows how to repress the sentiments of strong indignation in reading the cool vindication of the laws of England on this subject (now happily for the most part abolished by recent enactments) by Mr. Justice Blackstone, a man in many respects distinguished for habitual moderation and a deep sense of justice. "The second species," says he, "of nonconformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the Reformation, to be papists and Protestant dissenters, both of which were supposed to be equally schismatics in not communicating with the national church, with this difference, that the papists divided from it upon material though erroneous reasons, but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If, through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it, unless their tenets and practice are such as threaten ruin or disturbance to the State. He is bound, indeed, to protect the established church, and if this can be better effected by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do, the disposal of offices being matter of favor and discretion. But this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and color of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment."¹

§ 1848. And again: "As to papists, what has been said of the Protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only

¹ 4 Black. Comm. 52, 53.

upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession, their worship of reliques and images, nay, even their transubstantiation. But while they acknowledge a foreign power superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.”¹

§ 1849. Of the English laws respecting papists, Montesquieu observes that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. To this just rebuke, after citing it and admitting its truth, Mr. Justice Blackstone has no better reply to make than that these laws are seldom exerted to their utmost rigor; and, indeed, if they were, it would be very difficult to excuse them.² The meanest apologist of the worst enormities of a Roman emperor could not have shadowed out a defence more servile or more unworthy of the dignity and spirit of a freeman. With one quotation more from the same authority, exemplifying the nature and objects of the English test laws, this subject may be dismissed. “In order the better to secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are, however, two bulwarks erected, called the Corporation and Test Acts, — by the former of which no person can be legally elected to any office relating to the government of any city or corporation unless within a twelvemonth before he has received the sacrament of the Lord’s Supper according to the rites of the Church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office, or in default of either of these requisites, such election shall be void. The other, called the Test-Act, directs all officers, civil and military, to take the oaths, and make the declaration against transubstantiation in any of the king’s courts at Westminster, or at the quarter-sessions, within six calendar months after their admission, and also within the same time to receive the sacrament of the Lord’s Supper, according to the usage of the Church of England, in some public church immediately after

¹ 4 Black. Comm. 54, 55.

² 4 Black. Comm. 57.

divine service and sermon; and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses, upon forfeiture of 500*l.* and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I. c. 2, which permits no persons to be naturalized or restored in blood but such as undergo a like test; which test, having been removed in 1753 in favor of the Jews, was the next session of Parliament restored again with some precipitation.”¹ It is easy to foresee that without some prohibition of religious tests, a successful sect in our country might, by once possessing power, pass test-laws which would secure to themselves a monopoly of all the offices of trust and profit under the national government.²

§ 1850. The seventh and last article of the Constitution is: “The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.”

§ 1851. Upon this article it is now wholly unnecessary to bestow much commentary, since the Constitution has been ratified by all the States. If a ratification had been required of all the States instead of nine as a condition precedent to give it life and motion, it is now known that it would never have been ratified. North Carolina in her first convention rejected it; and Rhode Island did not accede to it until more than a year after it had been in operation.³ Some delicate questions, under a different state of things, might have arisen. What they were, and how they were disposed of at the time, is made known by the Federalist, in a commentary upon the article, which will conclude this subject.

§ 1852. “This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention which our own experience would have rendered inexcusable.

¹ See also 2 Kent's Comm. Lect. 24 (2d edit.), pp. 35, 36; Rawle on the Constitution, ch. 10, p. 121; 1 Tuck. Black. Comm. App. 296; 2 Tuck. Black. Comm. App. note (G.), p. 3.

² See *ante*, § 621.

³ *Ante*, vol. i. § 279.

§ 1853. "Two questions of a very delicate nature present themselves on this occasion. (1) On what principle the confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? (2) What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

§ 1854. "The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature, and of nature's God, which declares, that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. Perhaps also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the confederation that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the idea which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictated.

§ 1855. "The second question is not less delicate; and the flattering prospect of its being nearly hypothetical forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general, it may be observed, that although no political relation can subsist between

the assenting and dissenting States, yet the moral relations will remain uncanceled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must, in all cases, be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain moderation on one side, and prudence on the other.”¹

§ 1856. And here closes our review of the Constitution in the original form in which it was framed for, and adopted by, the people of the United States. The concluding passage of it is: “Done in convention, by the unanimous consent of all the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America, the twelfth.” At the head of the illustrious men who framed and signed it, men who have earned the eternal gratitude of their country, stands the name of GEORGE WASHINGTON, “President and Deputy from Virginia;” a name at the utterance of which envy is dumb, and pride bows with involuntary reverence; and piety, with eyes lifted to heaven, breathes forth a prayer of profound gratitude.

¹ The Federalist, No. 43.

CHAPTER XLIV.

AMENDMENTS TO THE CONSTITUTION.

§ 1857. We have already had occasion to take notice of some of the amendments made to the Constitution subsequent to its adoption, in the progress of our review of the provisions of the original instrument. (*a*) The present chapter will be devoted to a consideration of those which have not fallen within the scope of our former commentaries.

§ 1858. It has been already stated that many objections were taken to the Constitution not only on account of its actual provisions but also on account of its deficiencies and omissions.¹ Among the latter none were proclaimed with more zeal and pressed with more effect than the want of a bill of rights. This, it was said, was a fatal defect, and sufficient of itself to bring on the ruin of the republic.² (*b*) To this objection several answers were given: first, that the Constitution did, in fact, contain many provisions in the nature of a bill of rights, if the whole Constitution was not, in fact, a bill of rights; secondly, that a bill of rights was in its nature more adapted to a monarchy than to a government professedly founded upon the will of the people, and executed by their immediate representatives and agents; and thirdly, that a formal bill of rights, beyond what was contained in it, was wholly unnecessary, and might even be dangerous.³

§ 1859. The first answer was supported by reference to the clauses in the Constitution providing for the judgment in cases of impeachment; the privilege of the writ of *habeas corpus*; the trial

¹ Vol. I. B. 3, ch. 2.

² 2 Amer. Museum, 423, 424, 425; Id. 435; Id. 534; Id. 540, 543, 546; Id. 553.

³ The Federalist, No. 8; 3 Amer. Museum, 78, 79; Id. 559.

(*a*) The first ten amendments apply to the federal government alone. *Spies v. Illinois*, 123 U. S. 131, and many cases cited, from *Barron v. Baltimore*, 7 Peters, 243, down.

(*b*) See also Jefferson's Works, III. 4, 13, 101, 201; Id. II. 329, 358; Life and Correspondence of Justice Iredell, II. 186.

by jury in criminal cases; the definition, trial, and punishment of treason; the prohibition of bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, laws granting titles of nobility, and laws imposing religious tests. All these were so many declarations of rights for the protection of the citizens, not exceeded in value by any which could possibly find a place in any bill of rights.¹

§ 1860. Upon the second point it was said that bills of rights are in their origin stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, and reservations of rights not surrendered to the prince. Such was Magna Charta obtained by the barons, sword in hand, of King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles the First in the beginning of his reign. Such also was the declaration of rights presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards put into the form of an act of parliament called the Bill of Rights.² It is evident, therefore, that according to its primitive signification a bill of rights has no application to constitutions professedly founded upon the power of the people, and executed by persons who are immediately chosen by them to execute their will. In our country, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations.³ “We, the people of the United States, to secure the blessings of *liberty* to ourselves and our posterity, do ordain and establish this constitution for the United States of America” — is a better recognition of popular rights than volumes of those aphorisms which make a principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.⁴ (a)

§ 1861. Upon the third point it was said that a minute detail of particular rights was certainly far less applicable to a constitution designed to regulate the general political concerns of the

¹ The Federalist, No. 84.

² Mr. Chancellor Kent has given an exact though succinct history of the bills of rights, both in the mother country and the colonies, in 2 Kent's Comm. Lect. 24.

³ 1 Lloyd's Debates, 430, 431, 432.

⁴ The Federalist, No. 84.

(a) See Life and Correspondence of Mr. Justice Iredell, II. 187.

nation than to one which had the regulation of every species of personal and private concerns. But, it was added, the argument might justly be carried further. It might be affirmed that a bill of rights, in the sense and extent which is contended for, was not only wholly unnecessary, but might even be dangerous. Such a bill would contain various exceptions to powers *not* granted, and on this very account might afford a colorable pretext to claim more than was granted.¹ For why, it might be asked, declare that things shall not be done which there is no power to do? Why, for instance, that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? It is true, that upon sound reasoning a declaration of this sort could not fairly be construed to imply a regulating power, but it might be seized upon by men disposed to usurpation in order to furnish a plausible pretence for claiming the power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against an abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government.

§ 1862. It was further added, that in truth the Constitution itself was in every rational sense, and to every useful purpose, a bill of rights for the Union. It specifies and declares the political privileges of the citizens in the structure and administration of the government. It defines certain immunities and modes of proceeding which relate to their personal, private, and public rights and concerns. It confers on them the unalienable right of electing their rulers, and prohibits any tyrannical measures and vindictive prosecutions. So that at best much of the force of the objection rests on mere nominal distinctions, or upon a desire to make a frame of government a code to regulate rights and remedies.²

§ 1863. Although it must be conceded that there is much intrinsic force in this reasoning,³ it cannot in candor be admitted to

¹ 1 Lloyd's Debates, 433, 437.

² The Federalist, No. 84. See 1 Lloyd's Debates, 428, 429, 430 ; 3 Amer. Museum, 559.

³ It had, beyond all question, extraordinary influence in the convention ; for upon

be wholly satisfactory or conclusive on the subject. It is rather the argument of an able advocate than the reasoning of a constitutional statesman. In the first place, a bill of rights, in the very sense of this reasoning, is admitted in some cases to be important; and the Constitution itself adopts and establishes its propriety to the extent of its actual provisions. Every reason which establishes the propriety of any provision of this sort in the Constitution, such as a right of trial by jury in criminal cases, is, *pro tanto*, proof that it is neither unnecessary nor dangerous. It reduces the question to the consideration, not whether any bill of rights is necessary, but what such a bill of rights should properly contain. That is a point for argument upon which different minds may arrive at different conclusions. That a bill of rights may contain too many enumerations, and especially such as more correctly belong to the ordinary legislation of a government, cannot be doubted. Some of our State bills of rights contain clauses of this description, being either in their character and phraseology quite too loose and general and ambiguous, or covering doctrines quite debatable both in theory and practice, or even leading to mischievous consequences by restricting the legislative power under circumstances which were not foreseen, and if foreseen, the restraint would have been pronounced by all persons inexpedient and perhaps unjust.¹ Indeed the rage of theorists to make constitutions a vehicle for the conveyance of their own crude and visionary aphorisms of government requires to be guarded against with the most unceasing vigilance.²

§ 1864. In the next place a bill of rights is important, and may often be indispensable, whenever it operates as a qualification upon powers actually granted by the people to the government.³ This is the real ground of all the bills of rights in the

a motion being made to appoint a committee to prepare a bill of rights, the proposition was UNANIMOUSLY rejected. Journal of Convention, p. 369. This fact alone shows that it was at best deemed a subject of doubtful propriety, and that it formed no line of distinction between any of the parties in the convention. There will be found considerable reasoning on the subject in the debates in Congress on the amendments proposed in 1789. See 1 Lloyd's Debates, 414 to 426; Id. 426 to 447.

¹ 2 Kent's Comm. Lect. 24, p. 6 (2d edition, p. 9) and note, Id.; 1 Lloyd's Debates, 431, 432.

² This whole subject is treated with great felicity and force by Mr. Chancellor Kent, in his Commentaries; and the whole lecture will reward a most diligent perusal. 2 Kent's Comm. Lect. 24.

³ 1 Lloyd's Debates, 429, 430, 431, 432.

parent country, in the colonial constitutions and laws, and in the State constitutions. In England, the bills of rights were not demanded merely of the crown, as withdrawing a power from the royal prerogative; they were equally important, as withdrawing power from Parliament. A large proportion of the most valuable of the provisions in Magna Charta, and the Bill of Rights in 1688, consists of a solemn recognition of limitations upon the power of Parliament; that is, a declaration that Parliament *ought* not to abolish or restrict those rights. Such are the right of trial by jury; the right to personal liberty and private property according to the law of the land; that the subjects ought to have a right to bear arms; that elections of members of Parliament ought to be free; that freedom of speech and debate in Parliament ought not to be impeached, or questioned elsewhere; and that excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.¹ Whenever, then, a general power exists, or is granted to a government which may in its actual exercise or abuse be dangerous to the people, there seems a peculiar propriety in restricting its operations, and in excepting from it some at least of the most mischievous forms in which it may be likely to be abused. And the very exception in such cases will operate with a silent but irresistible influence to control the actual abuse of it in other analogous cases.²

§ 1865. In the next place, a bill of rights may be important, even when it goes beyond powers supposed to be granted. It is not always possible to foresee the extent of the actual reach of certain powers which are given in general terms. They may be construed to extend (and perhaps fairly) to certain classes of cases which did not at first appear to be within them. A bill of rights, then, operates as a guard upon any extravagant or undue extension of such powers. Besides, as has been justly remarked, a bill of rights is of real efficiency in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private rights. It requires more than ordinary hardihood and audacity of character to trample down principles which our ancestors have consecrated with rever-

¹ See Magna Charta, ch. 29; Bill of Rights, 1688; 5 Cobbett's Parl. Hist. p. 110.

² 1 Lloyd's Debates, 431, 432, 433, 434.

ence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are a part of the muniments of freemen, showing their title to protection; and they become of increased value when placed under the protection of an independent judiciary instituted as the appropriate guardian of the public and private rights of the citizens.¹

§ 1866. In the next place, it has been urged with much earnestness, a bill of rights is an important protection against unjust and oppressive conduct on the part of the people themselves. In a government modified like that of the United States, said a great statesman,² the great danger lies rather in the abuse of the community than of the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, — that which possesses the highest prerogative of power. But this is not found in the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority. It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. They are not so strong as to satisfy all who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and to rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.³

§ 1867. In regard to another suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis; and it could never furnish any just ground of objection that ingenuity might pervert or usurpation overleap the true sense. That objection will equally lie against all powers, whether large or limited, whether national

¹ 1 Kent's Comm. Lect. 24, pp. 5, 6 (2d edition, p. 8); 1 Lloyd's Debates, 429, 430, 431.

² Mr. Madison, 1 Lloyd's Deb. 431.

³ Ibid.

or state, whether in a bill of rights or in a frame of government. But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.¹

§ 1868. The want of a bill of rights, then, is not either an unfounded or illusory objection. The real question is not, whether every sort of right or privilege or claim ought to be affirmed in a constitution, but whether such as in their own nature are of vital importance and peculiarly susceptible of abuse ought not to receive this solemn sanction. Doubtless, the want of a formal bill of rights in the Constitution was a matter of very exaggerated declamation and party zeal, for the mere purpose of defeating the Constitution.² But so far as the objection was well founded in fact, it was right to remove it by subsequent amendments; and Congress³ have, as we shall see, accordingly performed the duty with most prompt and laudable diligence.⁴

§ 1869. Let us now enter upon the consideration of the amendments, which, it will be found, principally regard subjects properly belonging to a bill of rights.

§ 1870. The first is, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for a redress of grievances."

§ 1871. And first, the prohibition of any establishment of religion, and the freedom of religious opinion and worship. (a)

¹ Constitution, 9th Amendment; 1 Lloyd's Deb. 433.

² The Federalist, No. 84. See also 2 Elliot's Deb. 65, 160, 243, 330, 331, 334, 344, 345, 346; 1 Jefferson's Corresp. 64; 2 Jefferson's Corresp. 274, 291, 344, 443, 459; 1 Tuck. Black. Comm. App. 308; 2 Amer. Museum, 334, 378, 424, 540; 3 Amer. Museum, 548, 559; 1 Lloyd's Debates, 423 to 437; 5 Marshall's Life of Washington, ch. 3, pp. 207 to 210.

³ The first Congress.

⁴ See 5 Marshall's Life of Washington, ch. 3, pp. 207 to 210. Congress, in the preamble to these amendments, use the following language: "The conventions of a number of the States having at the time of adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution," &c. 1 Tuck. Black. Comm. App. 269.

(·) This provision does not prevent legislation against polygamy, though practised in the name of religion. Reynolds v. United States, 98 U. S. 145; Murphy

How far any government has a right to interfere in matters touching religion has been a subject much discussed by writers upon public and political law. The right and the duty of the interference of government in matters of religion have been maintained by many distinguished authors, as well those who were the warmest advocates of free governments as those who were attached to governments of a more arbitrary character.¹ Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues, — these never can be a matter of indifference in any well-ordered community.² It is, indeed, difficult to conceive how any civilized society can well exist without them. And at all events, it is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.

§ 1872. The real difficulty lies in ascertaining the limits to which government may rightfully go in fostering and encouraging religion. Three cases may easily be supposed: one, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all.

¹ See Grotius, B. 2, ch. 20, §§ 44 to 51; Vattel, B. 1, ch. 12, §§ 125, 126; Hooker's Ecclesiastical Polity, B. 5, §§ 1 to 10; Bynkershoek, 2 P. J. Lib. 2, ch. 18; Woodeson's Elem. Lect. 3, p. 49; Burlamaqui, pt. 3, ch. 3, p. 171, and Montesq. B. 24, ch. 1 to ch. 8, ch. 14 to ch. 16, B. 25, ch. 1, 2, 9, 10, 11, 12.

² See Burlamaqui, pt. 3, ch. 3, p. 171, &c.; 4 Black. Comm. 43.

v. Ramsey, 114 U. S. 15; *Davis v. Beason*, 133 U. S. 333; *Mormon Church v. United States*, 136 U. S. 1, on the power of Con-

gress to repeal the incorporation and wind up the affairs of the Church of Jesus Christ of Latter-Day Saints.

others; and a third, where it creates such an establishment, and excludes all persons not belonging to it, either wholly or in part, from any participation in the public honors, trusts, emoluments, privileges, and immunities of the state. For instance, a government may simply declare that the Christian religion shall be the religion of the state, and shall be aided and encouraged in all the varieties of sects belonging to it; or it may declare that the Catholic or Protestant religion shall be the religion of the state, leaving every man to the free enjoyment of his own religious opinions; or it may establish the doctrines of a particular sect, as of Episcopalians, as the religion of the state, with a like freedom; or it may establish the doctrines of a particular sect as exclusively the religion of the state, tolerating others to a limited extent, or excluding all not belonging to it from all public honors, trusts, emoluments, privileges, and immunities.

§ 1873. Now, there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally, as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period, without the slightest suspicion that it was against the principles of public law or republican liberty.¹ Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty. Montesquieu has remarked that the Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incompatible with the despotic rage with which a prince punishes his subjects, and exercises himself in cruelty.² He has gone even further, and affirmed that the Protestant religion is far more congenial with the true

¹ 2 Kent's Comm. Lect. 34, pp. 35 to 37; Rawle on Const. ch. 10, pp. 121, 122.

² Montesq. Spirit of Laws, B. 24, ch. 3.

spirit of political freedom than the Catholic. "When," says he, "the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the north embraced the Protestant, and those of the south still adhered to the Catholic. The reason is plain. The people of the north have, and will ever have, a spirit of liberty and independence which the people of the south have not. And, therefore, a religion which has no visible head is more agreeable to the independency of climate than that which has one."¹ Without stopping to inquire whether this remark be well-founded, it is certainly true that the parent country has acted upon it with a severe and vigilant zeal; and in most of the colonies the same rigid jealousy has been maintained almost down to our own times. Massachusetts, while she has promulgated in her BILL OF RIGHTS the importance and necessity of the public support of religion and the worship of God, has authorized the legislature to require it only for Protestantism. The language of that bill of rights is remarkable for its pointed affirmation of the duty of government to support Christianity, and the reasons for it. "As," says the third article, "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality, and as these cannot be generally diffused through the community but by the institution of the public worship of God, and of public instructions in piety, religion, and morality; therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall from time to time authorize and require, the several towns, parishes, &c., to make suitable provision at their own expense for the institution of the public worship of God, and for the support and maintenance of public *Protestant* teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily." Afterwards there follow provisions, prohibiting any superiority of one sect over another, and securing to all citizens the free exercise of religion.

§ 1874. Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that

¹ Montesq. *Spirit of Laws*, B. 24, ch. 5.

Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.¹

§ 1875. It yet remains a problem to be solved in human affairs, whether any free government can be permanent where the public worship of God and the support of religion constitute no part of the policy or duty of the state in any assignable shape. The future experience of Christendom, and chiefly of the American States, must settle this problem as yet new in the history of the world, abundant as it has been in experiments in the theory of government.

§ 1876. But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men or to punish them for worshipping God in the manner which they believe their accountability to him requires. It has been truly said that "religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence."² Mr. Locke himself, who did not doubt the right of government to interfere in matters of religion, and especially to encourage Christianity, at the same time has expressed his opinion of the right of private judgment and liberty of conscience in a manner becoming his character as a sincere friend of civil and religious liberty. "No man or society of men," says he, "have any authority to impose their opinions or interpretations on any other, the meanest Christian; since, in matters of religion, every man must know, and believe, and give an account for himself."³ The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority without a criminal disobedience of the precepts of natural as well as of revealed religion.

§ 1877. The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infi-

¹ See 2 Lloyd's Deb. 195, 196.

² Virginia Bill of Rights, 1 Tuck. Black. Comm. App. 296; 2 Tuck. Black. Comm. App. note G. pp. 10, 11.

³ Lord King's Life of Locke, p. 373.

delity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.¹ The history of the parent country had afforded the most solemn warnings and melancholy instructions on this head;² and even New England, the land of the persecuted Puritans, as well as other colonies, where the Church of England had maintained its superiority, would furnish out a chapter as full of the darkest bigotry and intolerance as any which could be found to disgrace the pages of foreign annals.³ Apostasy, heresy, and nonconformity had been standard crimes for public appeals, to kindle the flames of persecution, and apologize for the most atrocious triumphs over innocence and virtue.⁴

§ 1878. Mr. Justice Blackstone, after having spoken with a manly freedom of the abuses in the Romish church respecting heresy, and that Christianity had been deformed by the demon of persecution upon the continent, and that the island of Great Britain had not been *entirely* free from the scourge,⁵ defends the final enactments against nonconformity in England in the following set phrases, to which, without any material change, might be justly applied his own sarcastic remarks upon the conduct of the Roman ecclesiastics in punishing heresy.⁶ "For non-

¹ 2 Lloyd's Debates, 195.

² 4 Black. Comm. 41 to 59.

³ *Ante*, vol. i. §§ 53, 72, 74.

⁴ See 4 Black. Comm. 43 to 59.

⁵ "Entirely" / Should he not have said, *never* free from the scourge, as more conformable to historical truth?

⁶ 4 Black. Comm. 45, 46. His words are: "It is true that the sanctimonious hypocrisy of the Canonists went, at first, no further than enjoining penance, excommunication, and ecclesiastical deprivation for heresy, though afterwards they proceeded to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal but even a capital offence; the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and the drudgery of executions with which they themselves were too tender and delicate to intermeddle; nay, pretended to intercede and pray in behalf of the convicted heretic, *ut citra mortis periculum sententia circum eum moderetur*, well knowing at the same time that they were delivering the unhappy victim to certain death." 4 Black. Comm. 45, 46. Yet

conformity to the worship of the church," says he, "there is much more to be pleaded than for the former [that is, reviling the ordinances of the church], being a matter of private conscience, to the scruples of which our *present* laws have shown a very just and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes as may endanger the national church. There is always a difference to be made between toleration and establishment."¹ Let it be remembered, that at the very moment when the learned commentator was penning these cold remarks, the laws of England merely tolerated Protestant dissenters in their public worship upon certain conditions, at once irritating and degrading; that the Test and Corporation Acts excluded them from public and corporate offices, both of trust and profit; that the learned commentator avows that the object of the Test and Corporation Acts was to exclude them from office, in common with Turks, Jews, heretics, papists, and other sectaries;² that to deny the Trinity, however conscientiously disbelieved, was a public offence, punishable by fine and imprisonment; and that, in the rear of all these disabilities and grievances, came the long list of acts against papists, by which they were reduced to a state of political and religious slavery, and cut off from some of the dearest privileges of mankind.³

§ 1879. It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject.⁴

the learned author in the same breath could calmly vindicate the outrageous oppressions of the Church of England upon Catholics and dissenters with the unsuspecting satisfaction of a bigot.

¹ 4 Black. Comm. 51, 52.

² 1 Black. Comm. 58.

³ 1 Black. Comm. 51 to 59. Mr. Tucker, in his Commentaries on Blackstone, has treated the whole subject in a manner of most marked contrast to that of Mr. J. Blackstone. His ardor is as strong as the coolness of his adversary is humiliating on the subject of religious liberty. 2 Tuck. Black. Comm. App. note G. p. 3, &c. See also 4 Jefferson's Corresp. 103, 104; Jefferson's Notes on Virginia, 264 to 270; 1 Tuck. Black. Comm. App. 296.

⁴ 2 Lloyd's Debates, 195, 196, 197. "The sectarian spirit," said the late Dr. Cur-

The situation, too, of the different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition, as we have seen, of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.¹ (a)

§ 1880. The next clause of the amendment respects the liberty of the press. "Congress shall make no law abridging the freedom of speech or of the press."² That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, "is uniformly selfish, proud, and unfeeling." *Edinburgh Review*, April, 1832, p. 125.

¹ See 2 Kent's Comm. Lect. 24 (2d edition, pp. 35 to 37); Rawle on Const. Ch. 10, pp. 121, 122; 2 Lloyd's Deb. 195. See also vol. i. § 622.

² In the convention a proposition was moved to insert in the Constitution a clause, that the "liberty of the press shall be inviolably preserved;" but it was negatived by a vote of six States against five. *Journal of Convention*, p. 217.

(a) Mr. Madison was so fearful of violating the spirit of the first amendment to the Constitution, that he refused his assent to a bill incorporating an Episcopal church at Alexandria (Feb. 21, 1811), and also a bill reserving a certain parcel of public land for the use of a Baptist church in one of the territories (Feb. 28, 1811). Joseph Hawley refused (1780) to take his seat in the senate of Massachusetts because a religious test-oath was

required. See his letter in Niles's Principles and Acts of the Revolution, p. 374. On the other hand, many regard it as a matter of serious concern that the Constitution does not expressly recognize the Supreme Being, or the fact that the nation is Christian, and are in favor of an amendment which shall embrace such recognition. The subject, however, appears as yet but slightly to influence the public mind.

bility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow-citizens by the most atrocious calumnies; might disturb, nay, overturn, all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil, and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart. Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation;¹ and so always that he does not thereby disturb the public peace, or attempt to subvert the government.² It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives and for justifiable ends. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form.

§ 1881. A little attention to the history of other countries in

¹ 1 Tuck. Black. Comm. App. 297 to 299: 2 Tuck. Black. Comm. App. 11; 2 Kent's Comm. Lect. 24, pp. 16 to 26.

² Rawle on Const. ch. 10, pp. 123, 124; 2 Kent's Comm. Lect. 24, pp. 16 to 26; De Lolme, B. 2, ch. 12, 13; 2 Lloyd's Deb. 197, 198.

other ages will teach us the vast importance of this right. It is notorious that even to this day in some foreign countries it is a crime to speak on any subject, religious, philosophical, or political, what is contrary to the received opinions of the government or the institutions of the country, however laudable may be the design and however virtuous may be the motive. Even to animadvert upon the conduct of public men, of rulers, or representatives, in terms of the strictest truth and courtesy, has been and is deemed a scandal upon the supposed sanctity of their stations and characters, subjecting the party to grievous punishment. In some countries no works can be printed at all, whether of science or literature or philosophy, without the previous approbation of the government; and the press has been shackled, and compelled to speak only in the timid language which the cringing courtier or the capricious inquisitor should license for publication. The Bible itself, the common inheritance not merely of Christendom but of the world, has been put exclusively under the control of government, and not allowed to be seen or heard except in a language unknown to the common inhabitants of the country. To publish a translation in the vernacular tongue has been in former times a flagrant offence.

§ 1882. The history of the jurisprudence of England (the most free and enlightened of all monarchies) on this subject will abundantly justify this statement. The art of printing soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the king's proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star-Chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the Long Parliament of Charles the First, after their rupture with that prince, assumed the same powers which the Star-Chamber exercised with respect to licensing books; and during the Commonwealth (such is human frailty and the love of power even in republics!) they issued their ordinances for that purpose, founded principally upon a Star-Chamber decree in 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few

alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force; but it was so strongly resisted by Parliament that it expired in 1694, and has never since been revived.¹ To this very hour the liberty of the press in England stands upon this negative foundation. The power to restrain it is dormant, not dead. It has never constituted an article of any of her numerous bills of rights; and that of the revolution of 1688, after securing other civil and political privileges, left this without notice, as unworthy of care or fit for restraint.

§ 1883. This short review exhibits in a striking light the gradual progress of opinion in favor of the liberty of publishing and printing opinions in England, and the frail and uncertain tenure by which it has been held. Down to this very day it is a contempt of Parliament, and a high breach of privilege, to publish the speech of any member of either house without its consent.²(a) It is true that it is now silently established by the course of popular opinion to be innocent in practice though not in law. But it is notorious that within the last fifty years the publication was connived at rather than allowed; and that for a considerable time the reports were given in a stealthy manner, covered up under the garb of speeches in a fictitious assembly.

§ 1884. There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the King of England, it could do no wrong, and was free from every inquiry and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government. Mr. Justice Blackstone has remarked that

¹ 4 Black. Comm. 152, note; 2 Tuck. Black. Comm. App. note G. pp. 12, 13; De Lolme, B. 2 ch. 12, 13; 2 Kent's Comm. Lect. 24 (2d edition, pp. 17, 18, 19).

² See Comyn's Dig. *Parliament*, G. 9.

(a) See May's Constitutional History of England, ch. 7.

the liberty of the press, properly understood, is essential to the nature of a free state; but that this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, before and since the revolution (of 1688), is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, — the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And after some additional reflections, he concludes with this memorable sentence: "So true will it be found, that to censure the licentiousness is to maintain the liberty of the press."¹

§ 1885. De Lolme states the same view of the subject; and, indeed, the liberty of the press, as understood by all England, is the right to publish without any previous restraint or license;

¹ 1 Black. Comm. 152, 153; *Rex v. Burdett*, 4 Barn. & Ald. R. 95. Mr. Justice Best, in *Rex v. Burdett* (4 Barn. & Ald. R. 95, 132), said: "My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow-subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right, the right of character. This right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends."

so that neither the courts of justice nor other persons are authorized to take notice of writings intended for the press; but are confined to those which are printed; and in such cases, if their character is questioned, whether they are lawful or libellous is to be tried by a jury according to due proceedings at law.¹ (a) The noblest patriots of England, and the most distinguished friends of liberty both in Parliament and at the bar, have never contended for a total exemption from responsibility, but have asked only that the guilt or innocence of the publication should be ascertained by a trial by jury.²

¹ De Lolme, B. 2, ch. 12, 291 to 297.

² See also *Rex v. Burdett*, 4 Barn. & Ald. 95. The celebrated act of Parliament of Mr. Fox, giving the right to the jury, in trials for libels, to judge of the whole matter of the charge, and to return a general verdict, did not affect to go further. The celebrated defence of Mr. Erskine, on the trial of the Dean of St. Asaph, took the same ground. Even Junius, with his severe and bitter assaults upon established authority and doctrine, stopped here. "The liberty of the press," said he, "is the palladium of all the civil, political, and religious rights of an Englishman, and the right of juries to return a general verdict in all cases whatsoever is an essential part of our constitu-

(a) If the "freedom of the press" which the Constitution undertakes to preserve means no more than an exemption from a censorship of articles intended for publication, then it is obvious that the guaranty is as near worthless as possible; for Congress, while not establishing any censorship, might, nevertheless, in entire harmony with this second amendment, establish penalties for any publications whatever, however proper in their character, which might undertake to criticise the measures of government or bring the character or conduct of its officers under discussion. The liberty of speech and of the press are secured in the same words; and as the editor has said in another place, "Of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might, nevertheless, punish him for harmless publications. . . . The constitutional liberty of speech and of the press, as we understand it, implies

a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence, or as by their falsehood or malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." Cooley, *Const. Lim.*, 441, 442. For the history of the recent struggle in England for a more complete freedom of the press, see May, *Constitutional History*, ch. 7, 9, 10. C.

§ 1886. It would seem that a very different view of the subject was taken by a learned American commentator, though it is not, perhaps, very easy to ascertain the exact extent of his opinions. In one part of his disquisitions he seems broadly to contend that the security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and that this exemption, to be effectual, must be an exemption not only from the previous inspection of licensors but from the subsequent penalty of laws.¹ In other places he seems as explicitly to admit that the liberty of the press does not include the right to do injury to the reputation of another, or to take from him the enjoyment of his rights or property, or to justify slander and calumny upon him, as a private or public man. And yet it is added that every individual certainly has a right to speak or publish his sentiments on the measures of government. To do this without restraint, control, or *fear of punishment for so doing*, is that which constitutes the genuine freedom of the press.² Perhaps the apparent contrariety of these opinions may arise from mixing up, in the same disquisitions, a discussion of the right of the State governments with that of the national government to interfere in cases of this sort, which may stand upon very different foundations; or perhaps it is meant to be contended that the liberty of the press, in all cases, excludes public punishment for public wrongs, but not civil redress for private wrongs by calumny and libels.

§ 1887. The true mode of considering the subject is to examine the case with reference to a State government whose constitution, like that, for instance, of Massachusetts, declares that "the liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this connection." "The laws of England provide, as effectually as any human laws can do, for the protection of the subject in his reputation as well as in his person and property. If the characters of private men are insulted or injured, a double remedy is open to them, by action and by indictment." "With regard to strictures upon the characters of men in office, and the measures of government, the case is a *little* different. A *considerable* latitude must be allowed in the discussion of public affairs, or the liberty of the press will be of no benefit to society." But he nowhere contends for the right to publish seditious libels; and, on the contrary, through his whole reasoning he admits the duty to punish those which are really so.

¹ 2 Tuck. Black. Comm. App. 20; 1 Tuck. Black. Comm. App. 298, 299.

² 2 Tuck. Black. Comm. App. 28 to 30; 1 Tuck. Black. Comm. App. 298, 299.

monwealth." What is the true interpretation of this clause? Does it prohibit the legislature from passing any laws which shall control the licentiousness of the press, or afford adequate protection to individuals whose private comfort or good reputations are assailed and violated by the press? Does it stop the legislature from passing any laws to punish libels and inflammatory publications, the object of which is to excite sedition against the government, to stir up resistance to its laws, to urge on conspiracies to destroy it, to create odium and indignation against virtuous citizens, to compel them to yield up their rights, or to make them the objects of popular vengeance? Would such a declaration in Virginia (for she has, on more than one occasion, boldly proclaimed that the liberty of the press ought not to be restrained) prohibit the legislature from passing laws to punish a man who should publish and circulate writings the design of which avowedly is to excite the slaves to general insurrection against their masters, or to inculcate upon them the policy of secretly poisoning or murdering them? In short, is it contended that the liberty of the press is so much more valuable than all other rights in society, that the public safety, nay, the existence of the government itself, is to yield to it? Is private redress for libels and calumny more important or more valuable than the maintenance of the good order, peace, and safety of society? It would be difficult to answer these questions in favor of the liberty of the press without at the same time declaring that such a licentiousness belonged, and could belong only to a despotism, and was utterly incompatible with the principles of a free government.

§ 1888. Besides, what is meant by restraint of the press, or an abridgment of its liberty? If to publish without control or responsibility be its genuine meaning, is not that equally violated by allowing a private compensation for damages, as by a public fine? Is not a man as much restrained from doing a thing by the fear of heavy damages as by public punishment? Is he not often as severely punished by one as by the other? Surely it can make no difference in the case what is the nature or extent of the restraint, if all restraint is prohibited? The legislative power is just as much prohibited from one mode as from another. And it may be asked, where is the ground for distinguishing between public and private amenability for the wrong? The prohibition itself states no distinction. It is general; it is

universal. Why, then, is the distinction attempted to be made? Plainly, because of the monstrous consequences flowing from such a doctrine. It would prostrate all personal liberty, all private peace, all enjoyment of property and good reputation. These are the great objects for which government is instituted; and if the licentiousness of the press must endanger not only these but all public rights and public liberties, is it not as plain that the right of government to punish the violators of them (the only mode of redress which it can pursue) flows from the primary duty of self-preservation? No one can doubt the importance, in a free government, of a right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of the government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious discussion, must be encouraged. But the exercise of a right is essentially different from an abuse of it. The one is no legitimate inference from the other. Common-sense here promulgates the broad doctrine, *sic utere tuo, ut non alienum lædas*; so exercise your own freedom as not to infringe the rights of others, or the public peace and safety.

§ 1889. The doctrine laid down by Mr. Justice Blackstone respecting the liberty of the press has not been repudiated, as far as is known, by any solemn decision of any of the State courts, in respect to their own municipal jurisprudence. On the contrary, it has been repeatedly affirmed in several of the States, notwithstanding their constitutions or laws recognize that "the liberty of the press ought not to be restrained," or, more emphatically, that "the liberty of the press shall be inviolably maintained." This is especially true in regard to Massachusetts, South Carolina, and Louisiana.¹ Nay, it has further been held that the truth of the facts is not alone sufficient to justify the publication, unless it is done from good motives and for justifiable purposes, or, in other words, on an occasion (as upon the canvass of candidates for public office) when public duty or private right requires it.² And the very circumstance that in the constitutions

¹ Commonwealth v. Clap, 4 Mass. R. 163; Commonwealth v. Blanding, 3 Pick. R. 304; The State v. Lehre, 2 Rep. Const. Court, 809; 2 Kent's Comm. Lect. 24 (2d edition, pp. 17 to 24).

² Ibid.

of several other States provision is made for giving the truth in evidence, in prosecutions for libels for official conduct when the matter published is proper for public information, is exceedingly strong to show how the general law is understood. The exception establishes in all other cases the propriety of the doctrine. And Mr. Chancellor Kent, upon a large survey of the whole subject, has not scrupled to declare that "it has become a constitutional principle in this country, that every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*, and that no law can rightfully be passed to restrain or abridge the freedom of the press."¹

§ 1890. Even with these reasonable limitations, it is not an uncommon opinion among European statesmen of high character and extensive attainments that the liberty of the press is incompatible with the permanent existence of any free government, nay, of any government at all; that, if it be true that free governments cannot exist without it, it is quite as certain that they cannot exist with it; in short, that the press is a new element in modern society, and likely, in a great measure, to control the power of armies and the sovereignty of the people; that it works with a silence, a cheapness, a suddenness, and a force, which may break up in an instant all the foundations of society, and move public opinion, like a mountain torrent, to a general desolation of everything within its reach. (a)

§ 1891. Whether the national government possesses a power to pass any law not restraining the liberty of the press, but punishing the licentiousness of the press, is a question of a very different nature, upon which the commentator abstains from expressing any opinion. In 1798, Congress, believing that they possessed a constitutional authority for that purpose, passed an act punishing all unlawful combinations and conspiracies to oppose the measures of the government, or to impede the opera-

¹ 1 Kent's Comm. Lect. 24 (2d edition, pp. 17 to 24). See also Rawle on Const. ch. 10, pp. 123, 124.

(a) Yet it is particularly noticeable that from the beginning of the present century the disposition in England to impose restrictions upon the press in the discussion of public men and measures has been constantly growing weaker, while the character of its publications and the tone of its discussions have been

steadily broadening as liberty of the press has been enlarged. See especially the discriminating judgment of Lord Coleridge, C. J., in *Usill v. Hales*, 3 C. P. D. 819, a case which goes beyond American authority as yet, as seen *e. g.* in *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548.

tion of the laws, or to intimidate and prevent any officer of the United States from undertaking or executing his duty. The same act further provided for a public presentation and punishment, by fine and imprisonment, of all persons who should write, print, utter, or publish any false, scandalous, and malicious writing or writings against the government of the United States, or of either house of Congress, or of the President, with an intent to defame them, or bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States; or to excite them to oppose any law or act of the President in pursuance of law or his constitutional powers; or to resist, or oppose, or defeat any law; or to aid, encourage, or abet any hostile designs of any foreign nation against the United States. And the same act authorized the truth to be given in evidence on any such prosecution; and the jury, upon the trial, to determine the law and the fact, as in other cases.¹

§ 1892. This act was immediately assailed as unconstitutional, both in the State legislatures and the courts of law where prosecutions were pending. Its constitutionality was deliberately affirmed by the courts of law, and in a report made by a committee of Congress. It was denied by a considerable number of the States, but affirmed by a majority. It became one of the most prominent points of attack upon the existing administration; and the appeal thus made was, probably, more successful with the people, and more consonant with the feelings of the times, than any other made upon that occasion. The act, being limited to a short period, expired by its own limitation in March, 1801, and has never been renewed. It has continued, down to this very day, to be a theme of reproach with many of those who have since succeeded to power.² (a)

¹ Act of 14th July, 1798, ch. 91.

² The learned reader will find the subject discussed at large in many of the pamphlets of that day, and especially in the Virginia report and resolutions of the Virginia legislature, in December, 1798, and January, 1800: in the report of a committee of Congress on the alien and sedition laws, on the 25th of February, 1799; in the resolutions of the legislatures of Massachusetts and Kentucky, in 1799; in Bayard's speech on the Judiciary Act, in 1802; in Addison's charges to the grand jury, in Pennsylv-

(a) For prosecutions under this law, see Lyon's Case, Wharton's State Trials, 333; Cooper's Case, *Id.* 659; Haswell's Case, *Id.* 684; Calendar's Case, *Id.* 688. And see Life and Correspondence of James

Iredell, II. 559; Randall's Life of Jefferson, II. 417-421; Hildreth's History of the United States, V. 247, 365; Trial of Judge Chase on impeachment, and the contemporary political publications.

§ 1893. The remaining clause secures "the right of the people peaceably to assemble and to petition the government for a redress of grievances."

§ 1894. This would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen.¹(a)

§ 1895. The provision was probably borrowed from the declaration of rights in England, on the revolution of 1688, in which the right to petition the king for a redress of grievances was insisted on; and the right to petition Parliament in the like manner has been provided for and guarded by statutes passed before as well as since that period.² Mr. Tucker has indulged himself in a disparaging criticism upon the phraseology of this clause, as savoring too much of that style of condescension in which favors are supposed to be granted.³(b) But this

nia, printed with his reports; in 2 Tuck. Black. Comm. App. note G. pp. 11 to 30. It is surprising with what facility men glide into the opinion that a measure is universally deemed unconstitutional because it is so in their own opinion, especially if it has become unpopular. It has been often asserted by public men, as the universal sense of the nation, that this act was unconstitutional; and that opinion has been promulgated recently with much emphasis, by distinguished statesmen, as we have already had occasion to notice. What the state of public and professional opinion on this subject now is, it is, perhaps, difficult to determine. But it is well known, that the opinions then deliberately given by many professional men, and judges, and legislatures, in favor of the constitutionality of the law, have never been retracted. See vol. ii. §§ 1294, 1295, and note.

¹ See 2 Lloyd's Debates, 197, 198, 199.

² See 1 Black. Comm. 143; 5 Cobbett's Parl. Hist. pp. 109, 110; Rawle on Const. ch. 10, p. 124; 3 Amer. Museum, 420; 2 Kent's Comm. Lect. 24, pp. 7, 8.

³ 1 Tuck. Black. Comm. App. 299.

(a) But see the debates in Congress on the right of petition, and the twenty-first rule of the House of Representatives, adopted in 1838, on Mr. Atherton's motion. See also the report of Mr. John Whipple, in 1839, to Rhode Island legislature on the subject; and Mr. H. G. Otis's Letter to him, in March, 1839, on the same subject. Both were printed in a pamphlet in Boston, in 1839, by Cassady & March.

(b) The statements made in petitions

addressed to the proper authority, in a matter within its jurisdiction, are so far privileged that the petitioner is not liable, either civilly or criminally, for making them, though they prove to be untrue and injurious, unless he has made them maliciously. See *Thorn v. Blanchard*, 5 Johns. 528; *Gray v. Pentland*, 2 S. & R. 23; *Howard v. Thompson*, 21 Wend. 319; *Bodwell v. Osgood*, 3 Pick. 379; *Harris v. Harrington*, 2 Tyler, 129; *O'Donaghue v. McGovern*, 23 Wend. 26;

seems to be quite overstrained, since it speaks the voice of the people in the language of prohibition, and not in that of affirmation of a right supposed to be unquestionable and inherent.

§ 1896. The next amendment is: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." (a)

§ 1897. The importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.¹ And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.²

§ 1898. A similar provision in favor of Protestants (for to them

¹ 1 Tuck. Black. Comm. App. 800; Rawle on Const. ch. 10, p. 125; 2 Lloyd's Debates, 219, 220.

² It would be well for Americans to reflect upon the passage in Tacitus (Hist. IV. ch. 74): "*Nam neque quies sine armis, neque arma sine stipendiis, neque stipendia sine tributis, haberi queunt.*" Is there any escape from a large standing army but in a well-disciplined militia? There is much wholesome instruction on this subject in 1 Black. Comm. ch. 13, pp. 408 to 417.

Chapman v. Delorme, 2 Brev. 76; (a) See Presser v. Illinois, 116 U. S. Bradley v. Heath, 12 Pick. 163. 252.

it is confined) is to be found in the Bill of Rights of 1688; it being declared, "that the subjects, which are Protestants, may have arms for their defence suitable to their condition, and as allowed by law."¹ But under various pretences the effect of this provision has been greatly narrowed, and it is at present in England more nominal than real as a defensive privilege.² (a)

§ 1899. The next amendment is: "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law."

§ 1900. This provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right, of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion. The billeting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril. In the Petition of Right (4 Charles I.) it was declared by Parliament to be a great grievance.³

§ 1901. The next amendment is, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches (b) and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (c)

¹ 5 Cobbett's Parl. Hist. p. 110; 1 Black. Comm. 143, 144.

² 1 Tuck. Black. Comm. App. 300.

³ 2 Cobbett's Parl. Hist. 375; Rawle on Const. ch. 10, pp. 126, 127; 1 Tuck. Black. Comm. App. 300, 301; 2 Lloyd's Debates, 223.

(a) This is not the case in England now; the tendency of legislation for some years having been to encourage voluntary military organizations and the training of the people in arms.

(b) This applies to letters and sealed packages subject to letter postage, in the mails. *In re Jackson*, 96 U. S. 727. But Congress may prohibit the use of the mails for the transportation of matter injurious to the public morals. *Ibid.*

(c) See *Boyd v. United States*, 116 U. S. 616; *Entick v. Carrington*, 19 How. St. Trials, 1029, Lord Camden.

This provision of the Constitution was largely due to the great awakening caused

by the resort of the colonial authorities of Massachusetts Bay to "writs of assistance," as certain general search-warrants were called. These writs were general commands to search for smuggled goods wherever it was suspected that such could be found; they gave free rein to the officers; they had the full support of the English government. James Otis, who had been Advocate-General for the Crown, resigned his office when called upon to defend them, and at once took up the popular side, making in that behalf the most memorable speech of the times. *Paxton's Case*, Quincy, 51, an application for the writ. "The child Independence

§ 1902. This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmation of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American revolution. Although special warrants upon com-

was born on that occasion," said John Adams.

That was in the year 1761. Adams, then an ardent young lawyer, fortunately took notes of the speech; *fortunately*, for these notes furnish the best picture we have of a great event and a striking figure. Dr. Samuel A. Green, of Boston, has published some very interesting facts concerning these notes, in a pamphlet entitled "James Otis's Argument against the Writs of Assistance, 1761. Remarks made before the Massachusetts Historical Society, December 11, 1890." The notes appear to have been stolen from Adams, finding their way into the "Massachusetts Spy," of April 29, 1773, twelve years after the suit.

The speech as printed in "The Spy" was prefaced by a letter, quoted by Dr. Green, in the following language: "As the public have been lately alarmed with the evil and wicked effects of the power lodged in custom-house officers, by virtue of that most execrable of all precepts, a Writ of Assistance: And as I conceive it to be more immediately destructive of the liberty of the subject, than any other innovation of power: The following is offered to the public, being taken from the mouth of that great American oracle of law, JAMES OTIS, Esq.; in the meridian of his life." "This communication in the 'Spy,'" says Dr. Green, "furnishes substantially all our knowledge of that great speech. . . . His speech before the court lasted in its delivery between four and five hours, and created a profound sensation among all who heard it."

At first Mr. Adams appears to have set small store by his notes of the speech. Dr. Green quotes him as saying, "I took a few minutes in a very careless manner, which by some means fell into" other hands. "I was much more attentive to the information and the eloquence of the speaker than to my minutes, and too much alarmed at the prospect that was opened before me, to care much about writing a report of the controversy." This, in Adams's Autobiography. Later, the Ex-President appears to have set a truer value upon his notes, as correspondence quoted by Dr. Green shows. One passage from Green's account of this change of view gives us a picture of the court, of sufficient interest to justify a quotation of it here. "More than half a century after the delivery of the speech, in a letter to William Tudor, . . . the venerable Ex-President, in suggesting a subject for an historical painting, describes the scene of this trial in court, with the five judges in their fresh robes of scarlet cloth and their broad bands and judicial wigs; and seated near them at a long table were all the barristers of Boston and of the neighboring county of Middlesex, and they too in their gowns and bands and tie-wigs."

For the more special legal history of the Writs of Assistance the reader is referred to the learned and exhaustive notes of Hon. Horace Gray, now of the Supreme Court of the United States, to Quincy's Reports, Appendix, pp. 395 *et seq.* See also Paxton's Case, Id. 51, and notes.

plaints under oath, stating the crime, and the party by name against whom the accusation is made, are the only legal warrants upon which an arrest can be made according to the law of England,¹ yet a practice had obtained in the secretaries' office ever since the restoration (grounded on some clauses in the acts for regulating the press) of issuing general warrants to take up, without naming any persons in particular, the authors, printers, and publishers of such obscene or seditious libels as were particularly specified in the warrant. When these acts expired in 1694, the same practice was continued in every reign, and under every administration, except the last four years of Queen Anne's reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming or describing any person in special. In the year 1763, the legality of these general warrants was brought before the King's Bench for solemn decision, and they were adjudged to be illegal and void for uncertainty.² A warrant, and

¹ And see *Ex parte Burford*, 3 Cranch, 447; *Brady v. Davis*, 9 Georgia, 73, 1 Leading Criminal Cases, p. 161; 2 Lloyd's Debates, 226, 227.

² *Money v. Leach*, 3 Burr. 1743; 4 Black. Comm. 291, 292, and note Id. See also 15 Hansard's Parl. Hist. 1398 to 1418 (1764); *Bell v. Clapp*, 10 Johns. R. 263; *Sailly v. Smith*, 11 Johns. R. 500; 1 Tuck. Black. Comm. App. 301; Rawle on Const. ch. 10, p. 127. It was on account of a supposed repugnance to this article that a vehement opposition was made to the alien act of 1798, ch. 75, which authorized the President to order all such aliens as he should judge dangerous to the peace and safety of the United States, or have reasonable grounds to suspect of any treasonable or secret machinations against the government, to depart out of the United States, and in case of disobedience punished the refusal with imprisonment. That law having long since passed away, it is not my design to enter upon the grounds upon which its constitutionality was asserted or denied. But the learned reader will find ample information on the subject in the report of a committee of Congress on the petitions for the repeal of the alien and sedition laws, 25th of February, 1799; the report and resolutions of the Virginia legislature of 7th January, 1800; Judge Addison's charges to the grand jury in the Appendix to his reports; and 1 Tuck. Black. Comm. App. 301 to 304; Id. 306. See also *ante*, §§ 1288, 1289, and note.

Mr. Jefferson has entered into an elaborate defence of the right and duty of public officers to disregard, in certain cases, the injunctions of the law, in a letter addressed to Mr. Colvin in 1810. 4 Jefferson's Correspondence, 149, 151. On that occasion, he justified a very gross violation of this very article by General Wilkinson (if, indeed, he did not authorize it) in the seizure of two American citizens by military force, on account of supposed treasonable conspiracies against the United States, and transporting them, without any warrant or order of any civil authority, from New Orleans to Washington for trial. They were both discharged from custody at Washington by the Supreme Court, upon a full hearing of the case. *Ex parte Bollman & Swartout*, 4 Cranch, 75 to 136. Mr. Jefferson reasons out the whole case and assumes, without

the complaint on which the same is founded, to be legal, must not only state the name of the party, but also the time, and place, and nature of the offence with reasonable certainty.¹

§ 1908. The next (a) amendment is: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." (b) This is an exact transcript of a clause in the Bill of Rights framed at the revolution of 1688.² The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.³ It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts.⁴ In those times a demand of excessive bail was often made against persons who were odious to

the slightest hesitation, the positive guilt of the parties. His language is: "Under these circumstances, was he (General Wilkinson) justifiable (1) in seizing notorious conspirators! On this there can be but two opinions; *one, of the guilty and their accomplices; the other, that of all honest men!!!* (2) In sending them to the seat of government, when the *written law* gave them a right to TRIAL BY JURY. The danger of their rescue, of their continuing their machinations, *the tardiness and weakness of the law, apathy of the judges, active patronage of the whole tribe of lawyers, unknown disposition of the juries*, an hourly expectation of the enemy, salvation of the city, and of the Union itself, which would have been convulsed to its centre had that conspiracy succeeded; *all these constituted a law of necessity and self-preservation, and rendered the salus populi supreme over the WRITTEN law!!!*" Thus, the Constitution is to be wholly disregarded, because Mr. Jefferson has no confidence in judges, or juries, or laws. He first assumes the guilt of the parties, and then denounces every person connected with the courts of justice as unworthy of trust. Without any warrant or lawful authority, citizens are dragged from their homes under military force, and exposed to the perils of a long voyage, against the plain language of this very article; and yet three years after they are discharged by the Supreme Court, Mr. Jefferson uses this strong language.

¹ See *Ex parte Burford*, 3 Cranch, 447.

² 5 Cobbett's Parl. Hist. 110.

³ 2 Elliot's Debates, 345.

⁴ See 2 Lloyd's Debates, 225, 226; 3 Elliot's Debates, 345.

(a) That is, next for consideration here. Other amendments here passed over have been taken up, or indirectly considered elsewhere, among them the 7th. That amendment provides, in part, that trial by jury shall be preserved in suits at common law in matters exceeding \$20 in value. This does not apply to the statute

under which the Court of Claims was established. *McElrath v. United States*, 102 U. S. 426.

(b) Punishment by electricity is not forbidden by this provision. *In re Kemmler*, 136 U. S. 436. Further as to cruel punishments, see *Wilkinson v. Utah*, 99 U. S. 130.

the court and its favorites; and on failing to procure it, they were committed to prison.¹ Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject, Mr. Justice Blackstone has wisely remarked that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the Decemviri, were full of cruel punishments; the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished. Under the emperors severe laws were revived, and then the empire fell.²

§ 1904. It has been held in the State courts (and the point does not seem ever to have arisen in the courts of the United States) that this clause does not apply to punishments inflicted in a State court for a crime against such State, but that the prohibition is addressed solely to the national government, and operates as a restriction upon its powers.³ (a)

§ 1905. The next amendment is: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others.⁴ The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.⁵

§ 1906. The next and last amendment is: "The powers not

¹ Rawle on Const. ch. 10, pp. 130, 131.

² 4 Black. Comm. 17. See De Lolme, B. 2, ch. 16, pp. 366, 367, 368, 369.

³ See *Barker v. The People*, 3 Cowen's R. 686; *James v. Commonwealth*, 12 Sergeant and Rawle's R. 220. See *Barron v. Mayor of Baltimore*, 7 Peters's R. (1833).

⁴ See *ante*, vol. i. § 448; The Federalist, No. 83.

⁵ The Federalist, No. 84; *ante*, §§ 1852 to 1857; 1 Lloyd's Debates, 433, 437; 1 Tuck. Black. Comm. App. 307, 308.

(a) The decisions in the federal courts have settled this point in harmony with the conclusions of the State courts. See *Fox v. Ohio*, 5 How. 432; *Smith v.*

Maryland, 18 How. 71; *Puryear v. Commonwealth*, 5 Wall. 475; *Twitchell v. Commonwealth*, 7 Wall. 321.

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (a)

§ 1907. This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerated powers, it follows, irresistibly, that what is not conferred is withheld, and belongs to the State authorities if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.¹ When this amendment was before Congress, a proposition was moved to insert the word "expressly" before "delegated," so as to read, "the powers not *expressly* delegated to the United States by the Constitution," &c. On that occasion it was remarked, that it is impossible to confine a government to the exercise of express powers. There must necessarily be admitted powers by implication, unless the Constitution descended to the most minute details.² It is a general principle that all corporate bodies possess all powers incident to a corporate capacity, without being absolutely expressed. The motion was accordingly negatived.³ Indeed, one of the great defects of the confederation was, as we have already seen, that it contained a clause prohibiting the exercise of any power, jurisdiction, or right not *expressly delegated*.⁴ The consequence was, that Congress were crippled at every step of their progress, and were often

¹ See 1 Tuck. Black. Comm. App. 307, 308, 309.

² Mr. Madison added, that he remembered the word "expressly" had been moved in the Virginia convention by the opponents to the ratification; and after a full and fair discussion, was given up by them, and the system allowed to retain its present form. 2 Lloyd's Debates, 234.

³ 2 Lloyd's Debates, 243, 244; M'Culloch v. Maryland, 4 Wheat. R. 407; Martin v. Hunter, 1 Wheat. R. 325; Houston v. Moore, 5 Wheat. R. 49; Anderson v. Dunn, 6 Wheat. R. 225, 226.

⁴ Confederation, Article 2; *ante*, vol. i. § 230.

(a) Professor Parsons, in speaking of his father, the eminent chief justice, alludes to "his favorite clause of the Constitution, — that which reserves to the several States all powers not expressly delegated to Congress, — a clause for which he may well have had the affection of paternity. Whether he valued this

provision too highly, time will show. I cannot but think, as I believe he thought, that it is to this principle our country — if it is to remain one country — must look for political salvation, or look for it in vain." Memoir of Chief Justice Parsons, p. 258.

compelled, by the very necessities of the times, to usurp powers which they did not constitutionally possess; and thus, in effect, to break down all the great barriers against tyranny and oppression.¹

§ 1908. It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgment of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. All powers not delegated (not all powers not *expressly* delegated) and not prohibited, are reserved.² The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly," to qualify what is general, and obscure what is clear and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter, and employ criticism to support a theory, and not to guide it. One should suppose, if the history of the human mind did not furnish abundant proof to the contrary, that no reasonable man would contend for an interpretation founded neither in the letter nor in the spirit of an instrument. Where is controversy to end if we desert both the letter and the spirit? What is to become of constitutions of government if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions, to suit the temporary passions and interests of the day? Let us never forget that our constitutions of government are solemn instruments, addressed to the common sense of the people, and designed to fix and perpetuate their rights and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now and forever. They are of no man's private interpre-

¹ The Federalist, Nos. 33, 38, 42, 44; *ante*, vol. i. § 269.

² *M'Culloch v. Maryland*, 4 Wheat. R. 406, 407; *ante*, vol. i. § 433.

tation. They are ordained by the will of the people; and can be changed only by the sovereign command of the people.

§ 1909. It has been justly remarked that the erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. Time alone can mature and perfect so compound a system; liquidate the meaning of all the parts; and adjust them to each other in a harmonious and consistent whole.¹

¹ The Federalist, No. 82. See also Mr. Hume's *Essays*, vol. i. *Essay on the Rise of Arts and Sciences*.

CHAPTER XLV.

CONCLUDING REMARKS.

§ 1910. WE have now reviewed all the provisions of the original constitution of the United States, and all the amendments which have been incorporated into it. And here the task originally proposed in these Commentaries is brought to a close. Many reflections naturally crowd upon the mind at such a moment, — many grateful recollections of the past, and many anxious thoughts of the future. The past is secure. It is unalterable. The seal of eternity is upon it. The wisdom which it has displayed and the blessings which it has bestowed, cannot be obscured; neither can they be debased by human folly or human infirmity. The future is that which may well awaken the most earnest solicitude, both for the virtue and the permanence of our republic. The fate of other republics — their rise, their progress, their decline, and their fall — are written but too legibly on the pages of history, if indeed they were not continually before us in the startling fragments of their ruins. They have perished, and perished by their own hands. Prosperity has enervated them, corruption has debased them, and a venal populace has consummated their destruction. Alternately the prey of military chieftains at home, and of ambitious invaders from abroad, they have been sometimes cheated out of their liberties by servile demagogues; sometimes betrayed into a surrender of them by false patriots; and sometimes they have willingly sold them for a price to the despot who has bidden highest for his victims. They have disregarded the warning voice of their best statesmen; and have persecuted and driven from office their truest friends. They have listened to the fawning sycophant, and the base calumniator of the wise and the good. They have revered power more in its high abuses and summary movements than in its calm and constitutional energy, when it dispensed blessings with an unseen but liberal hand. They have surren-

dered to faction what belonged to the country. Patronage and party, the triumph of a leader, and the discontents of a day, have outweighed all solid principles and institutions of government. Such are the melancholy lessons of the past history of republics down to our own.

§ 1911. It is not my design to detain the reader by any elaborate reflections addressed to his judgment, either by way of admonition or of encouragement. But it may not be wholly without use to glance at one or two considerations, upon which our meditations cannot be too frequently indulged.

§ 1912. In the first place, it cannot escape our notice, how exceedingly difficult it is to settle the foundations of any government upon principles which do not admit of controversy or question. The very elements out of which it is to be built are susceptible of infinite modifications; and theory too often deludes us by the attractive simplicity of its plans, and imagination by the visionary perfection of its speculations. In theory, a government may promise the most perfect harmony of operations in all its various combinations. In practice, the whole machinery may be perpetually retarded, or thrown out of order by accidental mal-adjustments. In theory, a government may seem deficient in unity of design and symmetry of parts, and yet in practice it may work with astonishing accuracy and force for the general welfare. Whatever, then, has been found to work well in experience should be rarely hazarded upon conjectural improvements. Time and long and steady operation are indispensable to the perfection of all social institutions. To be of any value they must become cemented with the habits, the feelings, and the pursuits of the people. Every change discomposes for a while the whole arrangements of the system. What is safe is not always expedient; what is new is often pregnant with unforeseen evils and imaginary good.

§ 1913. In the next place, the slightest attention to the history of the national constitution must satisfy every reflecting mind how many difficulties attended its formation and adoption, from real or imaginary differences of interest, sectional feelings, and local institutions. It is an attempt to create a national sovereignty, and yet to preserve the State sovereignties; though it is impossible to assign definite boundaries in every case to the powers of each. The influence of the disturbing causes which,

more than once in the convention, were on the point of breaking up the Union, have since immeasurably increased in concentration and vigor. The very inequalities of a government confessedly founded in a compromise were then felt with a strong sensibility; and every new source of discontent, whether accidental or permanent, has since added increased activity to the painful sense of these inequalities. The North cannot but perceive that it has yielded to the South a superiority of representatives, already amounting to twenty-five, beyond its due proportion; and the South imagines that with all this preponderance in representation, the other parts of the Union enjoy a more perfect protection of their interests than her own. The West feels her growing power and weight in the Union; and the Atlantic States begin to learn that the sceptre must one day depart from them. If, under these circumstances, the Union should once be broken up, it is impossible that a new constitution should ever be formed embracing the whole territory. We shall be divided into several nations or confederacies, rivals in power and interest, too proud to brook injury, and too close to make retaliation distant or ineffectual. Our very animosities will, like those of all other kindred nations, become more deadly, because our lineage, laws, and language are the same. Let the history of the Grecian and Italian republics warn us of our dangers. The national constitution is our last and our only security. United we stand, divided we fall.

§ 1914. If these Commentaries shall but inspire in the rising generation a more ardent love of their country, an unquenchable thirst for liberty, and a profound reverence for the Constitution and the Union, then they will have accomplished all that their author ought to desire. Let the American youth never forget that they possess a noble inheritance, bought by the toils and sufferings and blood of their ancestors, and capable, if wisely improved and faithfully guarded, of transmitting to their latest posterity all the substantial blessings of life, the peaceful enjoyment of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly

aspire to such a title. It may, nevertheless, perish in an hour by the folly or corruption or negligence of its only keepers, — THE PEOPLE. Republics are created by the virtue, public spirit, and intelligence of the citizens. They fall when the wise are banished from the public councils, because they dare to be honest; and the profligate are rewarded, because they flatter the people in order to betray them.

CHAPTER XLVI.

By T. M. COOLEY.

THE EMANCIPATION OF THE SLAVES.

§ 1915. THE examination of the Constitution would be incomplete without some notice of the interesting and highly important changes made therein by amendments adopted after the conclusion of the great civil war.

§ 1916. The original compromises on the subject of slavery, and the condition of the country and of society at the time the Constitution was adopted, and from which those compromises sprung, have been touched upon in the preceding pages.¹ It is very generally believed that but for the mutual concessions then made the Constitution could not at that time have been adopted, and possibly all attempts to form a national government might for a long period have proved wholly abortive.² The subject of slavery was one upon which, for obvious reasons, the utmost sensitiveness might reasonably be looked for among men just emerging from a successful struggle for their own liberties; and it is worthy of remembrance that the Constitution, as finally agreed upon, did not mention it by name, but only referred to servitude and the slave trade in vague terms as things the existence of which under a free constitution was to be overlooked rather than recognized.³ It is not probable, however, that at that time the

¹ *Supra*, §§ 636-644, 1332-1337, 1807-1811.

² Curtis, *Hist. of Const.* II. 20, 292, 313; *Life and Writings of Judge Iredell*, II. 213; *Life of Webster* by Curtis, II. 382; Tucker's *Hist. of U. S.*, I. 362; Everett's *Speeches*, IV. 390; Greeley's *American Conflict*, ch. 5; *Lecture on Slavery at Faneuil Hall*, by Robert Toombs, January 24, 1856. On these concessions, it has justly been remarked by a recent writer, "hung mighty issues. They are of the past now. They were the price that was paid for republican government." Frothingham's *Rise of the Republic*, 594. Mr. Choate expresses the same idea, and classes concession "among the whiter virtues." *Life and Writings*, by Brown, II. 432, 433.

³ "The word 'slave' is not in the Constitution; and so peculiar and wise were its provisions that, when State after State abolished slavery, no alteration was required to meet the great social change. Nor would any change have been required

perpetuation of slavery was anticipated by any considerable number of the people. Indeed, in the colonial period no little repugnance had been manifested to the introduction of slaves; and though the people of the colonies were far from being blameless in the matter, the guilt of the slave trade rested principally upon the mother country, whose government had authorized and protected it, and as a matter of state policy had refused its assent to the measures proposed by the colonies to check it.¹ Those measures were adopted with a view to the ultimate extinction of the institution; and the refusal to sanction them was among the grave complaints made against the royal government which Mr. Jefferson would have introduced into the indictment incorporated in the declaration of independence.² The Congress

had all the States abolished slavery." Frothingham's *Rise of the Republic*, 602. "The word was carefully excluded from the instrument." Everett's *Orations*, IV. 390; Writings of Madison, III. 150; Draper's *Civil War*, I. 327, 328.

¹ Some notice of efforts against slavery in the colonial period will be found in Franklin's Works, X. 403. A history of the legislation on the subject in Virginia is given in the pamphlet published by Judge St. George Tucker in 1796, in which the gradual abolition of the institution in that State was urged. Referring to the petition of the burgesses in 1772 for the removal of restraints upon the authority to "check so very pernicious a commerce" as the traffic in slaves, he says: "A citizen of Virginia will feel some satisfaction at reading so clear a vindication of his country from the opprobrium but too lavishly bestowed upon her, of fostering slavery in her bosom, whilst she boasts a sacred regard to the liberty of her citizens and of mankind in general." Mr. Walsh, in his "Appeal from the Judgments of Great Britain respecting the United States of America," presents the proposed colonial measures still more fully.

² Mr. Jefferson's draft contained these words, afterwards struck out: "He [the king] has waged cruel war against human nature itself, violating its most sacred rights of life and liberty, in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the *Christian* king of Great Britain. Determined to keep open a market where *men* should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them; thus paying off former crimes committed against the *liberties* of one people with crimes which he urges them to commit against the *lives* of another." Jefferson's Works, I. 23. For the efforts by the colonies to put an end to the slave-trade which were frustrated by the royal negative, see Walsh's *Appeal*, 312 *et seq.*; Jefferson's Works, I. 3, 48, 135; Niles's *Principles and Acts of the Revolution*, 199; Brougham's *Colonial Policy*, Book II. sec. 1; Tucker's *Blackstone*, App. to vol. I. No colony was so persistent in its efforts to check the trade

of 1776 resolved "that no slaves be imported into any of the thirteen colonies;"¹ the leading men of the rising nation were earnestly opposed to this species of human bondage;² its extension into the vast and rich territory north-west of the Ohio was prohibited by ordinance in 1787; and the desire as well as the expectation appeared to be general that it must in time pass away, and that its extinction might be and ought to be hastened by appropriate legislation.³ Some of the States had begun the work before the Constitution was formed;⁴ but the evil was one

as Virginia; and Judge Tucker enumerates twenty-three acts on the subject, beginning with 1699. The petition of the assembly to the king in 1772 denounced the trade as one of great inhumanity, and prayed the king to "remove all those restraints on your majesty's governors of this colony which inhibit their assenting to such laws as might check so pernicious a commerce." The written instructions brought over by the governors in some cases forbade their assenting to any such laws, but they scarcely needed such instructions, for they participated more or less in the trade, and found their profit in it. Lord North gave as a reason for refusing his assent to petitions against the slave-trade that its profitable character made it *necessary* to the several European nations. Mr. Burke, in his speech on conciliation with America, justly observes, in response to a proposal to free the slaves and make use of them against the insurgents, that "dull as all men are from slavery, must they not a little suspect the offer of freedom from that very nation which had sold them to their present masters,—from that nation, one of whose causes of quarrel with those masters is their refusal to deal any more in that inhuman traffic? An offer of freedom from England would come rather oddly, shipped to them in an African vessel, which is refused an entry into the ports of Virginia or Carolina, with a cargo of three hundred Angola negroes. It would be curious to see the Guinea captain attempting at the same instant to publish his proclamation of liberty and to advertise his sale of slaves." *Burke's Works* (Little, Brown, & Co.'s ed.), II. 135.

¹ *Walsh's Appeal*, 321; *Works of John Adams*, III. 39.

² Mr. A. H. Stephens, in *The War between the States*, justly says of Mr. Jefferson that "no more earnest or ardent devotee to the emancipation of the black race, upon humane, rational, and constitutional principles ever lived than he was." Vol. I. p. 10. And see *Jefferson's Works*, I. 38, 49, 377; II. 357; VIII. 404; *Everett's Orations*, IV. 390. For similar views held by Mr. Madison, see his collected *Writings*, III. 138, 170, 193, 239; IV. 60, 213, 277. Samuel Adams, when a slave-girl was given to his wife [in 1764 or 1766] declared no slave should live in his house. If she came, she should be free. *Life of S. Adams*, I. 138. And see *Id.* III. 187.

³ *Works of John Adams*, III. 268; *Works of Jefferson*, I. 49, 377; *Walsh's Appeal*, 308, 391; *Lunt's Origin of the Late War*, 17. In 1796, Judge St. George Tucker, a jurist of whom Virginia is justly proud, published a forcible appeal to the people of that State, urging them to take steps towards gradual abolition.

⁴ Slavery was abolished in Massachusetts, not by an enactment expressly adopted for the purpose, but by a decision of the Supreme Court in 1781 that its existence was inconsistent with the declaration in the bill of rights that "all men are born free and equal." *Bradford's History of Massachusetts*, II. 227; *Draper's Civil War*, I. 318. Some individuals had previously manumitted their slaves, from a perception

which existed in different degrees in different parts of the country; and by common consent the convention of 1787 left the remedies for it to be discovered and administered by the several States, with the single exception that the general government was empowered, after 1808, to prohibit altogether the further importation of slaves. In all the States north of the Potomac the number of the slaves was small, and an early emancipation might be counted upon with reasonable certainty. South of that river it was different. The climate and the character of the labor was uninviting to white laborers, and whatever might be the scruples of conscience or the promptings of humanity, the tendency of self-interest was to quiet the one and to check the other. And this tendency received a wonderful acceleration in 1793, when the invention of the cotton-gin added so immensely to the profits and to the apparent necessity of slave labor. In 1790, Franklin, who had joined an anti-slavery society in Pennsylvania, united in a memorial to Congress for prohibitory legislation;¹ but this memorial being rejected for want of power, the subject was allowed to rest for nearly thirty years, with but little discussion, either in Congress or out of it, except that which was had in arranging the details of an abolition of the slave trade, which took place at the earliest period permitted by the Constitution, and in accordance with a tacit understanding at the time that instrument was adopted.² Meantime, though many thoughtful people still desired and hoped for the complete enfranchisement of all the people, the institution of slavery was constantly but imperceptibly strengthening itself, and taking

of their inconsistency in depriving others of liberty while contending for the like blessing for themselves. See a copy of a deed for this purpose in *Memoirs of Chief Justice Parsons*, 176, note; *Sumner's Speeches*, II. 289. They had occasion for self-reproach, for the same papers which published and rejoiced over the Declaration of Independence contained advertisements of runaway slaves. *Tyler's Memoir of Taney*, 338; *Granville Sharp's Injustice of Slavery*. The first act in Pennsylvania looking to gradual emancipation was adopted in 1780.

¹ *Annals of Congress*, 1789-1791, vol. 2, p. 1197; *Benton's Abridgment of Debates*, I. 204; *Tucker's Hist. of U. S.*, I. 431; *Rives's Life of Madison*, III. 129; *Lunt's Origin of the Late War*, 24; *Stephens's War between the States*, II. 28.

² See *Life of Josiah Quincy*, p. 42. Mr. Walsh, writing of the slave-trade in 1819, declares that in America "we have had no instance of a formal vindication of it in any shape. I have never heard of an American speech or pamphlet on the subject which did not acknowledge its atrocity." *Walsh's Appeal*, 320. Virginia forbade the traffic in 1778, being in this particular in advance of the more northern States.

stronger and firmer hold upon the interests and feelings of the people, and becoming more closely interwoven with the fabric of social life; and these circumstances, together with the great and constantly increasing number of slaves, made the problem of emancipation, and of a proper disposition of the slaves if set free, so formidable, that the inclination to attempt a solution became constantly less and less, and the evils of an institution which brought wealth and social distinction and comfort to the governing class were suffered less and less to obtrude themselves upon the attention.

§ 1917. In the year 1819, however, there sprung up suddenly and unexpectedly a violent and acrimonious conflict, which for a time threatened the peace of the country, and shook the confidence of many strong minds in the perpetuity of the Union.¹ The occasion for this controversy was the proposal to admit to the Union the new State of Missouri, formed from the territory acquired from France in 1803, under the name of Louisiana. Originally there had been some opposition to the acquisition of Louisiana, not only on the ground of want of constitutional power, but also because of a suspected purpose to strengthen the slaveholding section of the Union thereby;² and now, as one State after another was knocking at the door of the Union for admission, presenting in its constitution the incongruous guaranties of freedom and of slavery, political considerations, not less than an awakening conscience on the subject of involuntary servitude, prompted the most earnest resistance. When, therefore, it was proposed to allow Missouri to organize as a State, the most decided opposition was manifested at the north, and this opposition was intensified by the constitution presented, which not only recognized slavery, but took from the legislature all power to abolish it, and in order to give additional security to the institution, proposed to prohibit the admission of free negroes within the State.³ For a year an exceedingly bitter

¹ "Like a fire-bell in the night," was the striking comparison of Mr. Jefferson. Letter to Holmes, Jefferson's Works, VII. 159. It will be seen from the correspondence between Mr. John Adams and Mr. Jefferson that both of them had gloomy forebodings of sectional difficulties and possible disunion from this controversy. Indeed disunion was openly threatened on the floor of Congress during the debates.

² This feeling was strengthened and intensified when Louisiana applied for admission to the Union. See Hildreth, Hist. of U. S., V. 226; Life of Josiah Quincy, 207.

³ Mr. Benton avowed himself the author of the restriction, and justified it on

controversy was carried on; but at the expiration of that period a congressional compromise was effected, in pursuance of which, while Missouri was admitted under her slave constitution, she was nevertheless required to abstain from the proposed legislation against free blacks;¹ and as to the remaining territory belonging to the Union, it was enacted that "in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, excepting only such parts thereof as are included within the limits of [Missouri], slavery and involuntary servitude, otherwise than in the punishment of crime whereof the party shall have been duly convicted, shall be and is hereby forever prohibited." This compromise² left, and was intended to leave, all that portion of said territory south of the line specified open to the introduction of the institution which was prohibited to the north of it;³ but it was only effected with extreme

grounds not of right but of expediency. "The State of Missouri made her constitution sanctioning slavery and forbidding the legislature to interfere with it. This prohibition, not usual in State constitutions, was the effect of the Missouri controversy and of foreign interference, and was adopted for the sake of peace, for the sake of internal tranquillity, and to prevent the agitation of the slave question, which could only be accomplished by excluding it wholly from the forum of elections and legislation." Benton's *Thirty Years' View*, I. 8.

¹ The State was admitted "upon the fundamental condition that the fourth clause of the twenty-sixth section of the third article of the Constitution shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States in this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States." Thus did Congress assume that blacks were or might be citizens. Fifteen years later, when Mr. Hoar went from Massachusetts to South Carolina for the purpose of raising that question in the courts on behalf of colored seamen imprisoned under police laws, the authorities refused to permit the question to be mooted, and sent him out of the State. Draper's *Civil War*, I. 335; Lunt's *Origin of the Late War*, 133. Mr. A. H. Stephens thinks Mr. Hoar's mission was for the purpose of strife. Mr. Webster did not think so, though he seems to have doubted its policy. Speech of 7th March, 1850, Webster's Works, V. 432.

² We use the common expression, a compromise, though in fact there were two compromises; the result of both being as above given. The successive steps and the votes will be seen in the Annals of the 15th and 16th Congresses, and are detailed by Mr. Stephens in *The War between the States*, Colloquy xv.

³ Benton's *Thirty Years' View*, ch. 2; *Life of John Randolph*, II. ch. 12-15; Quincy's *Memoir of John Quincy Adams*, 97-119; Stephens's *War between the States*, II. 181-175; *Life and Writings of Story*, I. 359-365; Greeley's *American Conflict*, I. ch. 7; Draper's *Civil War*, I. 349; *Writings of Madison*, III. 156-199, 219, 240, 483; Everett's *Orations*, II. 582, 583; Tyler's *Memoir of Taney*, 336; *Life*

difficulty, and was so far from proving universally satisfactory that it influenced for a long time the politics and elections in some of the States,¹ and intensified, strengthened, and extended a sentiment which to some extent had previously existed in some quarters, that the general government should embrace the first opportunity to interpose all its legitimate authority to prevent the further extension of human bondage within the territory under its exclusive control. Nor was it long before it was perceived that the number was not inconsiderable who were ready to go further, and to enter upon a systematic agitation by means of newspapers and other publications, whereby they hoped to create a public opinion in favor of the entire and unconditional emancipation of slaves throughout the United States.

§ 1918. An agitation for emancipation, however feeble and apparently harmless in its beginnings, could not go on in one section of the country without arousing the most intense feeling in the other, under the influence of which retaliatory measures were threatened, and in some cases resorted to; and these in their turn tended to increase the opposition and extend the hatred of slavery at the north, until at length the demand that at least some restraints should be put upon its extension became so strong and persistent as to exercise a considerable influence in the choice of representatives in a large number of the congressional districts. In 1840, and again in 1844, a distinctive anti-slavery party had its presidential candidates in the field, and the votes drawn away from the other candidates in the election last mentioned affected sensibly, and as many thought conclusively, the general result.

§ 1919. The annexation of Texas, the consequent war, and the acquisition of further territory by the treaty of peace with Mexico, gave occasion for further excitement, which was promptly

of Josiah Quincy, 388; Hildreth's Hist. of U. S., ch. 31, 32. Mr. John Tyler, it seems, "always foresaw and predicted that the prohibition of slavery by Congress in any of the territories or new States would eventually abolish it in all the States where it existed by violent revolutionary means. The line of 36° 30' was not a line saying 'thus far shalt thou go and no farther,' but it was a mark of the doom of slavery on this continent, plainly proclaiming that it should not exist anywhere at all." Wise's Seven Decades of the Union, 74.

¹ In the northern States the compromise was generally unpopular, and the few northern men who voted for it sacrificed much of their popularity and influence at home in so doing.

seized upon and employed to the uttermost. These measures had been opposed originally as having for their object the strengthening of the slave-power. The major part of the territory acquired lay to the south of the Missouri compromise line, and if slavery was allowed to be extended into it, a political advantage would be given to the States in which this institution prevailed, which could not reasonably have been anticipated when that compromise was made. While therefore, the south in general was ready to accept an extension of the Missouri line to the Pacific, a considerable party at the north, regarding the question merely from a sectional stand-point, opposed its extension as unjust to their portion of the Union, while others took still higher ground, and declared that the territory had been unjustly acquired, and, inasmuch as while owned by Mexico it was free, an extension of slavery over it could not be permitted without a great national wrong and shame, which it was the duty of every patriot to prevent if possible, and which, if accomplished, must sooner or later lead to the most serious consequences.¹ An earnest and powerful agitation for complete prohibition was consequently entered upon; in the election of 1848 the anti-slavery party exhibited great and growing strength, and the party whose candidates were supposed to be most distinctly opposed to slavery restriction was defeated. It was plain that the growth of the anti-slavery sentiment was far more rapid than the increase of the third party would indicate, and that it permeated to a considerable degree the two leading political organizations which had been formed on other issues, and threatened their speedy disruption. But as that sentiment acquired strength and activity at the north, the inclination to justify and defend slavery increased at the south in the like proportion; irritating and sometimes threatening language and action were employed on both sides, even on the floors of Congress; the compromises of the Constitution were oftentimes disregarded and contemned, church organizations were broken asunder, and patriotic statesmen, who looked upon the strengthening and perpetuation of the Union as the chief hope and only sure guaranty of our liberties, began to anticipate the future with mingled feelings of doubt, distrust, and alarm. Upon what grounds, they began to ask, were men justified in looking for permanence in our institutions, if the very compro-

¹ Life and Writings of Choate, II. 275.

mises necessary to the establishment of any national government, and others of the like nature springing from the same imperious circumstances, were to be the occasion of a perpetual warfare of constantly-increasing bitterness ?¹

¹ There were many thoughtful persons who believed the agitation over the subject of slavery was to be accepted as an inevitable consequence of its existence in a country, one section of which condemned it as wrong in morals and injurious to the State. They believed that, so long as the people were thus divided on the subject, a perpetual controversy must inevitably go on ; and the expression of this belief sometimes subjected them to no little censure and odium, since it seemed to imply that a permanent adherence to the compromises of the Constitution was impossible, and therefore would not be attempted. One of the most eminent of these was Mr. Seward, who thus declared his views in a speech at Rochester, N. Y., October 25, 1858 ; " Free labor and slave labor, these antagonistic systems, are continually coming into close contact, and collision results. Shall I tell you what this collision means ? They who think it is accidental, unnecessary, the work of interested or fanatical agitators, and therefore ephemeral, mistake the case altogether. It is an *expressible conflict* between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slave-holding nation or entirely a free-labor nation. Either the cotton and rice fields of South Carolina, and the sugar plantations of Louisiana will ultimately be tilled by free labor, and Charleston and New Orleans become marts for legitimate merchandise alone, or else the rye fields and wheat fields of Massachusetts and New York must again be surrendered by their farmers to slave culture and to the production of slaves, and Boston and New York become once more markets for trade in the bodies and souls of men." Mr. Lincoln's remarks, in a speech at Springfield, Ill., June 17, 1858, were equally pointed : " A house divided against itself cannot stand ! I believe this government cannot endure permanently half slave and half free. I do not expect the union to be dissolved ; I do not expect the house to fall ; but I do expect it will cease to be divided. It will become all one thing or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its advocates will push it forward till it shall become alike lawful in all the States, old as well as new, north as well as south." Similar views were frequently expressed by southern statesmen. See Mr. H. S. Foote's statement of the fact in his *War of the Rebellion*, p. 18. Mr. John Randolph had long before said : " I know there are gentlemen, not only from the northern but from the southern States, who think that this unhappy question — for such it is — of negro slavery, which the Constitution has vainly attempted to blink, by not using the term, should never be brought into public notice, more especially into that of Congress, and most especially here. Sir, with every due respect for the gentlemen who think so, I differ from them *toto cælo*. Sir, it is a thing which cannot be hid — it is not a dry-rot which you can cover with the carpet until the house tumbles about your ears ; you might as well try to hide a volcano in full operation ; it cannot be hid ; it is a cancer in your face, and must be treated *secundum artem* ; it must not be tampered with by quacks who never saw the disease or the patient." *Life of Randolph*, by Hugh A. Garland, II. 262. If among the dominant race the subject of slavery, considered on grounds of morality and policy, was thus irritating and dangerous, how much more so must it have been when the discontent of

§ 1920. It was not a circumstance calculated to soften the asperities of such a controversy, that each party professed to keep within the stipulations of the Constitution; the one defending the obnoxious institution with that instrument as their protection, and the other insisting upon a constitutional right to prevent its extension, while conceding that the federal government was powerless to disturb it in the States, and that, consequently, their opposition to it within the States must be limited to appeals to the moral sense and judgment of the people thereof. Such professions were more or less regarded as wanting in candor, and each party was earnestly accused by the other of intentional disregard of constitutional rights and obligations, and each was suspected of further purposes which at present were disclaimed. It could not be denied that the law for the rendition of fugitive slaves, which had been passed in 1793, had become exceedingly difficult of enforcement, and that on the part of large numbers of the people an insuperable repugnance existed to permitting any person fleeing from bondage and seeking a refuge among them, to be seized and remanded to perpetual slavery. Meantime, no new State, whether its constitution recognized slavery or prohibited it, could be admitted to the Union without encountering earnest opposition because of the influence the admission might be supposed likely to have in strengthening or weakening this most perplexing institution. Thus affairs were rapidly tending to a crisis when a new compromise was proposed and effected in 1850, by the earnest and concurrent efforts of many of the leading statesmen of the country, representing all sections and both the great political parties.

§ 1921. The chief features of the new compromise were, the admission of California to the Union as a free State; the passage of a new and more efficient law for the rendition of fugitives from service; an understanding that new States might in the

the blacks was taken into the account. "Slavery," said Joseph Warren, "is not only the greatest misfortune, but it is also the greatest crime, if there be a possibility of escaping it." *Life and Times of Warren*, 20. And see *Id.* 345. He spoke of political slavery, but the sentiment in favor of personal liberty is only still more intense and imperious, and it must reasonably be expected to prevail among the slaves in a degree proportioned to their intelligence. That it might also at some time and under some circumstances become dangerous, was fully believed and avowed by some persons of prominence in the southern States.

future be carved out of Texas; the prohibition of the slave trade in the District of Columbia; and the organization of new territories without either expressly prohibiting or expressly permitting the introduction of slavery therein. It was vainly hoped that through this compromise a dangerous agitation had at length been settled by a finality;¹ a few years dispelled the illusion; the Missouri compromise was repealed, and in the territory of Kansas armed conflicts took place between the pro-slavery and anti-slavery parties in their attempts respectively to obtain control of the local government, and by means thereof be enabled to fix the character of its future institutions; and a small but determined band, collected in the northern States, plunged into Virginia, hoping to organize an insurrection of slaves in behalf of their liberty.²

§ 1922. In the Presidential election of 1856, the anti-slavery party was second in strength, and came near succeeding; and it was thought providential by some persons that a cause was then pending in the federal courts involving the power of Congress to impose restrictions upon the taking of slaves into the territories, the decision of which, if heartily accepted, or even acquiesced in,

¹ Mr. Clay, Mr. Webster, and Mr. Cass gave the best efforts of their declining years to this compromise, and Mr. Benton also supported the various measures. These eminent men appeared to believe that if they individually were capable of rising above their old antagonisms and conquering their prejudices, it was possible for them to lead their respective parties to a harmonious gathering around an altar of common sacrifice. Some of them lived to discover how futile was the expectation. The old leaders exchanged the olive-branch of peace, but new leaders at the very time were marshalling their forces for more determined conflicts.

An account of the workings of the Fugitive Slave Law of 1850 for the first year is given in the report of the American and Foreign Anti-Slavery Society for 1851. See also May's *Anti-Slavery Conflict*; Lunt's *Origin of the Late War*, ch. 8; *History of the Underground Railroad*, and numerous other anti-slavery publications. The northern States very generally passed what were known as Personal Liberty Acts, to give protection to their citizens against being wrongfully seized and delivered over as slaves. These tended greatly to increase the excitement, being denounced at the south, and by many at the north, as unconstitutional, and as intended to nullify the law for the surrender of slaves.

² "From the moment of the Lecompton fraud and the Kansas wars and the John Brown raid, we began to prepare for the worst. We looked carefully to the State armory, and whilst we had the selection of the State quota of arms, we were particular to take field ordnance instead of altered muskets." Such were the premonitions and such the course of Gov. Wise, of Virginia. See his *Seven Decades of the Union*, 250. It has been said that Gov. Banks, of Massachusetts, also foresaw the inevitable struggle, and was observing similar precautions.

by the people, might put an end to the political agitation of the subject. The decision came, and was adverse to the power; but instead of extinguishing, it only added new fuel to the fires of controversy, and made the Supreme Court the target for arrows that before were being showered upon political opponents.¹ In 1860, the candidate of the anti-slavery party for President was chosen by a considerable plurality, and this success being regarded on the part of leaders of public opinion in the southern States as evidence of a fixed determination in the opposite section of the Union to intermeddle with southern institutions in an unconstitutional manner, they refused to accept any explanation or any assurances to the contrary, but took immediate steps for the disruption of the Union.² Claiming a right in the several States to withdraw at will from the confederacy they had formed, they proceeded in the assertion of that right, and declared their unalterable determination, in case it should be contested, to submit it to the arbitrament of force. (a) Thus slavery became the immediate occasion of the civil war, though the assumed right of secession had no necessary connection with slavery, and might have been asserted on any other ground or occasion with the same plausibility.³

¹ See Mr. Buchanan's account of his administration. Chief Justice Taney was the principal subject of these attacks; but now that the question involved has ceased to be one of practical importance, the warmest partisan may well review former opinions, and concede proper motives to the eminent jurist whose opinions he could not concur in. The chief justice has found both an affectionate and a vigorous defender in his biographer and friend, Prof. Samuel Tyler.

² Early in February, 1861, a "Peace Conference," as it was called, composed of delegates from twenty-one States, convened at Washington to agree upon some new compromise. Certain propositions were agreed to and reported to Congress, but failed to command the assent of that body. On the 28th day of February, 1861, the following amendment to the Constitution of the United States, proposed in the House of Representatives, was adopted by that body by a vote of 133 to 65: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." On the second day of March following, the Senate approved the proposed amendment by a vote of 24 to 12, and it was submitted to the States for ratification. Ohio and Maryland ratified it promptly, but as it became immediately apparent that it was not to prove successful in staying the tide of secession, the other States abstained from the fruitless ceremony.

³ "Either as a motive, pretext, or rallying cry, slavery was the cause of the war."

(a) The seceding States were never, as matter of law, out of the Union. White & Hart, 13 Wall. 646.

§ 1923. The dealings of the government with slavery, and the influence of that institution upon military plans and movements, constitute a chapter of high importance and interest in the history of the great civil war, but an account of them would be out of place here. Before the war was ended most men came to acknowledge, what a few had perceived from the beginning, that the same blows which destroyed the rebellion must inflict mortal wounds upon slavery; and indeed the proclamation of emancipation which the President had put forth as a war measure, had had the effect to abolish the institution in the insurgent territory as fast as it was brought under the control of the federal forces.¹ The President was among those who had foreseen that, in the progress of the war, unless slavery was destroyed, it must be a constant, serious, and perhaps fatal impediment to the success of the national arms; and so early as March, 1862, he had recommended, and Congress had assented to, the giving from the national treasury of pecuniary assistance to such of the loyal slaveholding States as should take steps in the emancipation of their slaves. Unfortunately for those States, the public sentiment among their citizens was not prepared to accept the inevitable result, but, on the contrary, the majority appeared to think, and did, in fact, believe, that their loyalty to the government gave them special and strong claims for protection of their system of labor at its hands, and they felt wronged and injured that these claims were not always recognized and responded to. In this respect, however, a change was going on in northern sentiment, which was forced by public events, and could not be arrested or checked. Before the war, to sustain the institution of slavery as

Everett at Faneuil Hall, Works, IV. 714. See Stephen's *War between the States*, II. 25, 26; Wise's *Seven Decades of the Union*, 248.

¹ *Weaver v. Lapsley*, 42 Ala. 601; *Morgan v. Nelson*, 43 Ala. 586; *Slaback v. Cushman*, 12 Fla. 472; *Dorris v. Grace*, 24 Ark. 326; *Texas v. White*, 7 Wall. 728. The first or conditional proclamation of emancipation bore date September 22, 1862, and was in the nature of a warning that unless the rebellious States should lay down their arms before the first day of the following January, a further proclamation would then be issued declaring the slaves therein, or in such portions thereof as should then persist in rebellion, forever free. Many patriotic persons blamed the act; others as earnestly blamed the delay. "It is a poor document," said Gov. Andrew, of Massachusetts, "but a mighty act: slow, somewhat halting, wrong in its delay till January, but grand and sublime after all. Prophets and kings have waited for this day, but died without the sight. We must take up the silver trumpet and repeat the immortal strain on every hill-top and in every household of New England."

it existed in the southern States, was, in the minds of many of the ablest and most patriotic men in the nation, to sustain the Union, because it was protected by the compromises of the Constitution; and those who frowned upon the efforts of the abolitionists, and sought to enforce in good faith the settlement of 1850, felt themselves justified in assuming the name of friends of the Constitution and of the Union. Now, however, when the Union was assailed, to defend its integrity required that hard blows should be struck at its enemies whenever and wherever they would be most damaging; and if slavery was the most vulnerable point, then it was believed that to be friends of the Constitution and of the Union was to be in antagonism to slavery. The war went on without further efforts at compensated emancipation; but by the proclamation of freedom, the enlistment of slaves in the army,¹ the disturbances caused by the movements of military forces, and the total overthrow of the institution in those States where it had been found most profitable and was deemed most important, it became so much demoralized and weakened elsewhere, that its most earnest defenders began at length to give way before the exertions of its assailants, whose efforts were redoubled as circumstances made the institution more and more the occasion of division in the nation, and who were determined to eliminate this element of national weakness, this source of perpetual danger. And on the 18th day of December, 1865, a constitutional amendment wholly prohibiting slavery, which had been proposed by Congress early in the year,² was, by the proclamation of the President, declared to have been ratified by three-fourths of the States.

§ 1924. This, which constitutes the thirteenth article of the amendments to the Federal Constitution, declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their juris-

¹ Slaves served in the American army of the Revolution, and those of Virginia were emancipated by legislative act in October, 1783; "an act of justice," says Judge St. George Tucker, "to which they were entitled upon every principle." Pamphlet proposing the gradual abolition of slavery in Virginia: Phila. 1796. Towards the last, Mr. Jefferson Davis favored a general arming of slaves in defence of the confederate cause, and Gen. Lee concurred; but the confederate congress did not venture upon the necessary legislation. *Alfriend's Life of Davis*, ch. 20.

² January 31. The Senate approved of the amendment April 8, 1864.

diction." (a) The phraseology of this amendment is borrowed from the celebrated ordinance of 1787, which dedicated to freedom the so-called North-West territory now embracing the five great States of Ohio, Indiana, Illinois, Michigan, and Wisconsin, and a part of Minnesota. Nothing by way of comment can make its provisions plainer; the boast of English lawyers and philanthropists after *Sommersett's Case*¹ that a "slave cannot breathe in Britain, but the moment he sets foot upon her soil he becomes free," is equally or even more strictly true of America.² It forbids not merely the slavery heretofore known to our laws, but all kinds of involuntary servitude not imposed in punishment for public offences, and it establishes freedom as the constitutional right of all persons in every State and on every foot of land within the jurisdiction of the Union.³

§ 1925. The mark of degradation which slavery stamped upon the colored race, and which had been found alike prejudicial to those who imposed and to those who suffered it, has thus been removed, and the disturbance and danger to the body politic occasioned by its existence has ceased. And though the suffering inflicted and losses sustained in removing this anomaly in our institutions are still felt keenly, there are already abundant evidences that the losses are soon to be forgotten in abundant compensations, and that the suffering is even now accepted as the necessary and unavoidable condition to a better national and social life.

§ 1926. The second clause of the same amendment provides that "Congress shall have power to enforce this article by appropriate legislation." On the 9th day of April, 1866, Congress acted under this clause in the passage of "an act to protect all persons in the United States in their civil rights, and furnish the means of their vindication." The first section of this act declares "that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared

¹ 20 State Trials, 1; Lofft, 18; Broom, Const. Law, 105.

² The common-law of England permits the impressment of seafaring men for the royal navy. *Ex parte Fox*, 5 State Trials, 276; *Bradford's Case*, 18 State Trials, 1323; *Rex v. Tubbs*, Cowp. 512; *Foster*, Cr. Law, 178; 1 Bl. Comm. 419; Broom, Const. Law, 116. But this is not suffered in America.

³ *Matter of Turner*, 1 Abb. U. S. R. 84.

(a) See the Civil Rights Cases, 109 U. S. 3.

to be citizens of the United States: and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same rights in every State and territory of the United States, to make and enforce contracts; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other; any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." The subsequent sections impose penalties for the violation of the rights here declared, and give the appropriate criminal and civil remedies.

§ 1927. The authority of Congress to pass this act was affirmed (a) by Mr. Chief Justice Chase in a case which arose under a statute of Maryland, for the apprenticing of negro children. That statute made important distinctions between white and colored apprentices; describing the master's right in the latter case as "property and interest," making no provision for education, and allowing an assignment of the indentures by the master to any person in the county: in all which particulars it differed from the indentures required in the case of white children. The apprenticeship of colored children, under this statute, was declared by the learned chief justice to be involuntary servitude, within the meaning of the amendment above given, and consequently wholly void.¹ Had there been any doubt of its being void under this article, there could be none, it is believed, of its incom-

¹ *Matter of Turner*, 1 Abb. U. S. R. 84. See *Blyew v. United States*, 13 Wall. 581.

(a) The act was by a majority of the court held unconstitutional, in the Civil Rights Cases, 109 U. S. 3. The whole subject is well set out in 1 Hare, Am. Const. Law, pp. 535 *et seq.* The legislation was deemed an infringement of the police powers of the States. The learned author just cited says in regard to legislation by Congress under the 14th amendment: "The United States therefore, can no more provide that, under the 14th amendment, all persons shall be admitted,

irrespective of race or color, to public places and conveyances, than they can make a like rule with regard to persons of different sexes, or enact that female students shall be admitted promiscuously to every lecture-room where the anatomy of the human body is taught to men. Such questions fall under the police power, which belongs exclusively to the States, except in the rare instances where it is conferred affirmatively on Congress." *United States v. Harris*, 106 U. S. 639.

patibility with article fourteen, which was adopted soon after, and for the enforcement of which subsequent legislation was had, which we shall have occasion to refer to further on.¹

¹ The act of April 9, 1866, from which we have quoted above, was re-enacted and enlarged May 31, 1870, and the stringency of its provisions increased. It has been held by the Supreme Court that the fact of a State denying to colored persons the right to testify on the trial of white persons accused of crime, would not authorize the federal courts to take jurisdiction of and try a charge against a white person of an offence against the State. *Blyew v. United States*, 13 Wall. 581. Mr. Justice Swayne had held otherwise at the circuit. *United States v. Rhodes*, 1 Abb. U. S. R. 28.

It may not be impertinent to allude here to an interesting question which, after emancipation, arose concerning contracts which had previously existed for the hire or sale of slaves, and upon which money was owing. Some of the reconstructed States forbade, by their constitutions, any recovery on these contracts; but, independent of these prohibitions, it was argued by some parties that when the laws which supported slavery were repealed, such contracts had no support in law. Of this opinion was Chief Justice Chase, who, in *Osborn v. Nicholson*, 13 Wall. 663, summarizes his views as follows:—

“1st. That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law.

“2d. That the laws of the several States by which alone slavery and slave contracts could be supported were annulled by the thirteenth amendment of the Constitution, which abolished slavery.

“3d. That thenceforward the common law of all the States was restored to its original principles of liberty, justice, and right, in conformity with which some of the highest courts of the late slave States, notably that of Louisiana, have decided, and all might, on the same principles, decide, slave contracts to be invalid, as inconsistent with their jurisprudence, and this court has properly refused to interfere with those decisions.

“4th. That the clause in the fourteenth amendment of the Constitution which forbids compensation for slaves emancipated by the thirteenth, can be vindicated only on these principles.”

See also opinion of Caldwell, Dist. J., in the same case at the circuit, 1 Dillon, 219. Also in *Buckner v. Street*, Id. 248. But the Supreme Court, in the case first mentioned, held that if the contracts were valid when made, they were not affected by emancipation.

CHAPTER XLVII.

BY T. M. COOLEY.

THE FOURTEENTH AMENDMENT.

§ 1928. THE fourteenth article of the amendments, to which we now direct our attention, must find its justification in the great changes brought about by the civil war, and in the disorders following and resulting therefrom, and which seemed to render new precautions and new securities important, if not imperative. Those disorders, it must be confessed, were not so serious as might reasonably have been anticipated, when the magnitude of the great social change was considered, and the circumstances under which it was finally consummated were kept in view. A great, brave, but unsuccessful army was now broken up and remanded to civil life: many of its members had been reduced by the war from affluence to poverty; they returned to their homes to find the persons who had been their lawful slaves elevated by means of the military successes over them to a condition of equality before the law with themselves; they returned to find labor disorganized, the whole social life changed, their own prospects, anticipations, and hopes seriously impaired; the freedmen, whom they had always been taught to consider their inferiors, had assisted in effecting this revolution, and were now rejoicing over the very events which worked discomfiture and disaster to their late masters. Yet in the hands of the latter was still the political authority; in numbers they predominated; they were superior in intelligence; the colored people were still in great measure dependent upon them for subsistence; and it was unreasonable to expect that the relations between the two classes were to be adjusted to the new circumstances without the feelings and passions which war and emancipation had engendered finding occasional expression in acts of disorder, injustice, and violence. The disbandment of a great army is always a circumstance of no little solicitude and danger, but it is doubly so when it must be

scattered among a people who have been elevated from slavery to manhood by its defeat, but who, nevertheless, being the weaker in numbers and resources, must be more or less dependent on the defeated party for just and kind treatment, and even for the means of subsistence.

§ 1929. Nor were some other circumstances to be overlooked when the legislation, temporary or permanent, which the times demanded came to be considered. Persons who had held high positions in the States and the nation had been prominent and active in the effort to create a new confederacy on the ruins of the Union, and reasonably might be expected to retain after their failure some degree of dissatisfaction with the government whose workings they had thought would justify a revolution, and from which, in consequence, they had endeavored, though in vain, to withdraw their section. In aid of the rebellion a very large indebtedness had been contracted, which the courts now held to be illegal and worthless, but which, nevertheless, a very considerable number of persons was interested in, and a still greater number believed to be just and deserving of payment. The debt, on the other hand, which had been created by the government to carry on the war, the same classes, and perhaps others, might be willing to repudiate, under the pretence that it had been incurred for a purpose which, in their view, ought not to have been accomplished. To Congress and to the majority of the people it seemed clear that these circumstances demanded additional securities by way of constitutional amendment, not only for the purpose of protecting the newly conferred rights and liberties of the African race, but also to secure against possible dangers the credit of the States and the honor of the general government. And acting on this belief, Congress, in June, 1866, submitted to the States a further amendment, which, two years later, after having received in due form the approval of the requisite number of the States, was published, by direction of the Secretary of State, as duly ratified.¹

¹ July 28, 1868. The proclamation in this case was peculiar. It is a part of the history of the times that the President differed with Congress on the whole subject of the reconstruction of the States lately in rebellion, and that the proceedings taken by him for their reorganization, and for the establishment of loyal State governments, were set aside by Congress. The reasons for this action on the part of that body may be stated in general terms to have been, that the power to originate such proceedings was legislative and not executive; that the steps taken by the President did not sufficiently protect the government against the danger of such States passing immediately

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State

ner hereinbefore mentioned, by the States specified in the said concurrent resolution, namely, the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and also by the legislature of the State of Georgia; the States thus specified being more than three-fourths of the States of the United States.

"And I do further certify that the said amendment has become valid to all intents and purposes as a part of the Constitution of the United States.

"In testimony whereof I have hereunto set my hand and caused the seal of the department of State to be affixed.

"Done at the city of Washington, this 28th day of July, in the year of our Lord 1868, and of the independence of the United States of America the ninety-third.

"WILLIAM H. SEWARD,
"Secretary of State."

In referring to the history of the reconstruction measures of Congress, we may also mention the attempt in the name of the State of Mississippi to enjoin the President from enforcing those measures on the ground of unconstitutionality. The attempt failed; the Supreme Court of the United States holding that it was not in the power of the judiciary to coerce or restrain the President in the performance of his executive and political functions. *Mississippi v. Johnson*, 4 Wall. 475. The case was distinguished from *Marbury v. Madison*, 1 Cranch, 137, and *Kendall v. Stockton*, 12 Pet. 527, in which cases the acts to be performed were purely ministerial, and nothing was left to the discretion of the officer. See also *Georgia v. Stanton*, 6 Wall. 51.

The question whether a State which has once ratified a constitutional amendment may afterward withdraw its assent, has now ceased to be of practical importance as regards the amendments already made, which are ratified whether the withdrawing States are counted or not. But it still has a speculative interest, which may at some future day be something more. Generally speaking, when a proposition is made for a mutual compact or agreement, no one is bound by his expression of concurrence until the others have accepted; his own acceptance must up to that time be regarded as provisional, and may be withdrawn at pleasure. If a proposed agreement, compact, or convention between States stands on any different footing, the consequences may possibly, under some circumstances, be extremely serious, if the final acceptance of a constitutional amendment shall be postponed by any States until important changes bearing upon the propriety or necessity of the act have taken place. Suppose, for instance, the constitutional amendment proposed in 1861 for the protection of slavery in the States had been accepted at that time by the requisite number of States save three, could it be seriously urged that, in 1865, after the circumstances had wholly changed, the three States of Kentucky, Maryland, and Delaware, — supposing them not to have been originally assenting, and the number of States not to have increased, — could move the subject anew, and by their ratification bind the other States to an amendment protecting slavery, notwithstanding the other States had withdrawn their assent, and notwithstanding the amendment, if then for the first time proposed, would unceremoniously have been rejected by the great majority?

deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (a)

§ 1931. The purpose of the first clause of this paragraph undoubtedly was, to put at rest forever the question whether colored persons were to be recognized as citizens. That question had been before the Supreme Court in a very noted case,¹ and a deci-

Perhaps this suggestion of a case that might easily have been possible but for the precipitation of events, will be sufficient to show the unsoundness and danger of a rule which, if applied as suggested, would find no analogies in the law applicable to private contracts. It will be remembered that two of the amendments proposed and submitted during Washington's administration were not adopted by the requisite number of the States. Are they still pending for ratification by the others?

¹ *Dred Scott v. Sandford*, 19 How. 393.

(a) A statute which declares that no more than two new trials shall be granted to the same party in any action at law, or upon the trial by jury of an issue of fact in equity, is not inconsistent with the fourteenth Amendment. *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614. Nor does this amendment interfere with the rights of the States in respect of police powers. *Powell v. Commonwealth*, 127 U. S. 678 (relating to the making of oleomargarine); *Kidd v. Pearson*, 128 U. S. 1 (as to intoxicating liquors); *Mugler v. Kansas*, 123 U. S. 623 (the same).

It is no objection to legislation as being obnoxious to this amendment that it is special, where the legislation applies to all alike. *Missouri Pacific R. Co. v. Mackey*, 127 U. S. 205. Corporations are within the operation of the amendment. *Ibid.*; *Minneapolis R. Co. v. Beckwith*, 129 U. S. 26; *Santa Clara v. Southern Pacific R. Co.*, 118 U. S. 394; *Pembina Silver Mining Co. v. Pennsylvania*, 125 U. S. 181.

Railroads may be required to provide and maintain fences and cattle-guards along their tracks. *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512; *Minneapolis R. Co. v. Beckwith*, *supra*.

Further as to this amendment, see *Nashville R. Co. v. Alabama*, 128 U. S. 96; *Walston v. Nevin*, 128 U. S. 578;

Wurts v. Hoagland, 114 U. S. 606; *Richmond R. Co. v. Richmond*, 96 U. S. 529; *Missouri Pacific R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis Ry. Co. v. Herrick*, *Id.* 210; *Walker v. Pennsylvania*, *Id.* 699; *Minneapolis R. Co. v. Beckwith*, 129 U. S. 26; *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *Church v. Kelsey*, 121 U. S. 282; *Little Rock R. Co. v. Worthen*, 120 U. S. 97; *Hayes v. Missouri*, *Id.* 68; *Barbier v. Connolly*, 113 U. S. 27; *Chicago R. Co. v. McLaughlin*, 119 U. S. 566; *Yick Wo v. Hopkins*, 118 U. S. 356; *Head v. Amoskeag Manuf. Co.*, 113 U. S. 9; *Pace v. Alabama*, 106 U. S. 583; *Bush v. Kentucky*, 107 U. S. 110 (statute excluding all but white citizens from serving on jury held unconstitutional); *Neal v. Delaware*, 103 U. S. 386 (same); *Strauder v. West Virginia*, 100 U. S. 303 (same); *Virginia v. Rives*, *Id.* 313 (same); *Ex Parte Virginia*, *Id.* 313 and 339 (same); *Gross v. United States Mortgage Co.*, 108 U. S. 477; *Civil Rights Cases*, 109 U. S. 3; *United States v. Cruikshank*, 92 U. S. 542; *Louisiana v. New Orleans*, 109 U. S. 285; *Missouri v. Lewis*, 101 U. S. 22 (right of the State to erect courts of appeal); *Richmond R. Co. v. Richmond*, 96 U. S. 521; *Walker v. Sauvinet*, 92 U. S. 90 (trial by jury).

sion had been rendered adverse to their right. That decision, however, had been the subject of violent and angry political excitement; the conclusion of the people, as indicated by the elections, appeared to be adverse to its soundness; and after the breaking out of the great civil war, it had not been recognized as law by either of the political departments of the government.¹ Moreover, the Civil Rights Act of 1866, to which attention has already been directed, had expressly declared the right of colored persons to citizenship, and made, for the protection of this right, stringent regulations which were being enforced throughout the Union. An act of Congress, however, was not, for obvious reasons, the most satisfactory determination of a question of this nature. In the first place, the rights of a class of persons still suffering under a ban of prejudice could never be deemed entirely secure when at any moment it was within the power of an unfriendly majority in Congress to take them away by repealing the act which conferred them. But in the second place, the decision of the Supreme Court above referred to still remained unreversed by any formal determination of the court, and if that decision was to be followed, it might be doubtful whether the Civil Rights Act itself would be held to be within the powers conferred upon Congress. Any possible doubt that could exist on so important a question it was obviously proper to have settled in the most authoritative and conclusive mode; and after the passions engendered by the war had been suffered to cool, and the people had begun to turn their attention from the contests of the past to a consideration of the demands of the present and the future, the number was few indeed who would have been disposed to deny citizenship to this portion of the people, or to object to a settlement of the question by express declaration of the Constitution itself.²

¹ See opinion of Attorney-General Bates of Nov. 29, 1862. Perhaps it would not be incorrect to add to what is said in the text, that the decision in *Scott v. Sandford* had been disregarded by the judicial department also; for soon after Mr. Chase took his seat as chief justice of the Supreme Court, a person of African blood was sworn in as an attorney and counsellor of that court, without objection from any quarter. Mr. Buchanan, in his account of his administration (p. 51), truly remarks that the correctness and binding effect of the decision referred to were instantly resisted by the republican party and what were known as the Douglas democrats of the north; the two together constituting a very large majority of all the voters in that section of the Union.

² The new constitutional amendments were expressly accepted as a finality by formal resolutions adopted in the conventions of each of the great political parties,

§ 1932. The word "citizen" (a) is employed in the law in different senses under different circumstances. As generally employed, however, it may be said to mean a person owing allegiance to the government, and entitled to protection from it. Such, doubtless, is the meaning of the word as here used. It therefore includes females as well as males, minors as well as adults, those who do not as well as those who do possess the privilege of the elective franchise. This clause consequently confers the right to vote or to participate in the government upon no one. That is a privilege which under no government belongs to all citizens, but is conferred upon those persons only who possess the special qualifications which are described by express law.¹

§ 1933. Under the definition given above, and by the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in the country, more or less permanent, for business, instruction, or pleasure, are not citizens.² Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either State or territorial, are extended, they are protected by and at the same time held amenable to those laws in all their intercourse with the body politic and

held in 1872; even those who had opposed them originally uniting in declaring them conclusive.

¹ See this point discussed at length in Opinion of Attorney-General Bates of Nov. 29, 1862. He very correctly remarks that "no person in the United States ever did exercise the right of suffrage in virtue of the naked unassisted fact of citizenship. In every instance the right depends upon some additional fact and cumulative qualification, which may as perfectly exist without as with citizenship."

² Persons brought in by the annexation of foreign territory are not regarded as aliens, but as citizens. So it was decided in the case of Mr. Yulee, chosen a member of Congress from Florida, and this ruling has been acted upon since as clearly and unquestionably correct.

(a) The right of suffrage does not follow upon this amendment; citizens, even when of age, are not necessarily voters; the amendment has nothing to do with female suffrage. *Minor v. Happersett*, 21 Wall. 162. Nor is citizen suffrage

conferred by other parts of the Constitution; State laws restricting suffrage to men are valid. *Id.* See also *Bradwell v. Illinois*, 16 Wall. 130 (right of women to practise law).

with the individuals composing it; but they are also, as a *quasi* foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are "subject to the jurisdiction" of the United States only in a much qualified sense; and it would obviously be inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights, or, on the other hand, subjected to the full responsibilities of American citizens. It would not for a moment be contended that such was the effect of this amendment.¹ (a) When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and as his case is then within the terms of this amendment, it would seem that his right to protection, in person, property, and privilege, must be as complete as the allegiance to the government to which he must then be held; as complete in short, as that of any other native-born inhabitant.

§ 1934. The States are also forbidden to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." What are privileges and immunities of citizens of the several States has been somewhat considered in another place;² and an examination of the judicial decisions there referred to will illustrate the difficulty to be encountered in any attempt at a satisfactory enumeration. The Supreme Court has felt the full force of this difficulty, and has declared

¹ "They have never been regarded as citizens or members of our body politic within the contemplation of the Constitution. They have always been and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection and subject to our coercion, so far as the public safety required it, and no farther." Per Kent, Chancellor, in *Goodell v. Jackson*, 20 Johns. 710.

² *Supra*, §§ 1805, 1806, and notes. See particularly the cases of *Corfield v. Coryell*, 4 Wash. C. C. 380, and *Paul v. Virginia*, 8 Wall. 180. Also opinion of Attorney-General Bates of Nov. 29, 1862.

(a) See *Elk v. Wilkins*, 112 U. S. 94.

that it would not describe and define them in a general classification; preferring to deal with each case on a consideration of its particular facts.¹ These things are, beyond question, among the privileges and immunities of citizens of the States: to be protected in life and liberty by the law; to acquire, possess, and enjoy property; to contract and be contracted with under general laws; to be exempted from inequality in the burdens of government; to establish family relations under the regulations of law; to choose from those which are lawful the profession or occupation of life; to institute and maintain actions of every kind in the courts, and to make defence against unlawful violence. The elective franchise, it has been seen, is not of necessity a citizen's right; but whenever he can bring himself within the qualifications prescribed therefor, it is his privilege to do so, and particular and invidious distinctions must be regarded as forbidden. And the same may be said of the like distinctions under laws establishing public schools, pre-emption laws, exemption laws, and the like; the rules which exclude persons from their benefits must be uniform and not partial; the individual citizen is always entitled to the benefits of the general laws which govern society.

§ 1935. We have already given the first section of the Civil Rights Act, so called, enacted by Congress a short time before this amendment was submitted by that body to the States for ratification, and which undertook an enumeration of the rights which the freedmen, by virtue of the citizenship which the act proposed to assure to them, should possess and enjoy. These rights, we may safely infer, were understood by Congress to be the same with the privileges and immunities of citizens in general. The freedmen were to "have the same right in every State and territory of the United States to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and to be subject to the like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

§ 1936. Such are the privileges and immunities of citizens of

¹ Connor v. Elliott, 18 How. 591.

the States: to be protected in life and liberty, and in the acquisition and enjoyment of property, under equal and impartial laws which govern the whole community. This "puts the State upon its true foundation: a society for the establishment and administration of general justice, — justice to all, equal and fixed, recognizing individual rights and not imparting them." It recognizes "the important truth — in a republican government, the fundamental truth — that the minority have indisputable and inalienable rights; that the majority are not everything and the minority nothing; that the people may not do what they please, but that their power is limited to what is just to all composing society."¹ The people of the States, in framing their several constitutions, have undertaken to secure these fundamental rights against invasion; sometimes by particular enumeration; more often by general words; always in some form of language supposed to be completely effectual; and we may with the utmost propriety apply to their several guaranties as they now stand what has so justly been said of one of them: "These are not vain words. Within the sphere of their influence no person can be *created*, no person can be *born*, with civil or political privileges not enjoyed equally by all his fellow-citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble, or black, — he may be of Caucasian, Jewish, Indian, or Ethiopian race, — he may be of French, German, English, or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English, or Irish: he is MAN, the equal of all his fellow-men. He is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care. To some it may

¹ We cannot forbear making in this place the above quotation from a letter from Mr. Justice Story to Dr. Francis Lieber, acknowledging the worth and soundness of the work by that profound thinker, entitled "The State." That work undertook to show, among other things, that there are limits to the authority of society over individuals which no majority, however great, can override; and the fourteenth amendment seeks to embody the fundamental principle which he pointed out, as a part of the written compact upon which the political fabric is constructed. See the letter from which the quotation is made, in *Life and Letters of Justice Story*, II. 278.

justly allot higher duties, according to higher capacities; but it welcomes all to its equal hospitable board. The State, imitating the divine justice, is no respecter of persons."¹

§ 1937. It is to be observed, however, that it is not the privileges of citizens of the several States which are to be protected under the clause now being considered, but "the privileges and immunities of citizens of the United States." The difference is in a high degree important. Although citizens of the United States are commonly citizens of individual States, this is not invariably the case, and if it were, the privileges which pertain

¹ Argument of Mr. Charles Sumner on Equality before the Law. Speeches, II. 341. We take the liberty to quote somewhat from Mr. Everett on the same general subject. "Grant that no new benefit — which, however, can by no means with truth be granted — be introduced into the world on this plan of equality, still it will have discharged the inestimable office of communicating, in equal proportion, to all the citizens, those privileges of the social union which were before partitioned in an invidious gradation profusely among the privileged orders, and parsimoniously or not at all among the rest." "The people of this country are, by their constitutions of government, endowed with a new source of enjoyment, elsewhere almost unknown, — a great and substantial happiness. Most of the desirable things of life bear a high price in the world's market. Everything usually deemed a great good must, for its attainment, be weighed down, in the opposite scale, with what is usually deemed a great evil, — labor, care, danger. It is only the unbought, spontaneous, essential circumstances of our nature and condition that yield a liberal enjoyment. Our religious hopes, intellectual meditations, social sentiments, family affections, political privileges, — these are springs of unpurchased happiness; and to condemn men to live under an arbitrary government is to cut them off from nearly all the satisfaction which nature designed should flow from those principles within us by which a tribe of kindred men is constituted a people." Everett's Orations, I. 122, 123.

The first paragraph of the Massachusetts Body of Liberties, adopted in 1641, was exceedingly comprehensive in its specification of privileges and immunities. "No man's life shall be taken away; no man's honor or good name shall be stained; no man's person shall be arrested, restrained, banished, dismembered, nor anyways punished; no man shall be deprived of his wife or children; no man's goods or estate shall be taken away, or any way endangered, under color of law, or countenance of authority; unless it be by virtue or equity of some express law of the country warranting the same, established by the general court and sufficiently published, or, in case of the defect of the law in any particular case, by the word of God; and in capital cases, or in cases concerning dismembering or banishment, according to that word to be judged by the general court." Palfrey, Hist. of New England, II. 26. And the preamble to that code is specially significant, and reads as if prepared for and written in anticipation of the very clause we have now under review; "The free fruition of such liberties, immunities, and privileges, as humanity, civility, and Christianity call for, as due to every man, in his place and proportion, without impeachment or infringement, hath ever been and ever will be the tranquillity and stability of churches and commonwealths; and the denial or deprival thereof, the disturbance, if not the ruin, of both."

to citizenship under the general government are as different in their nature from those which belong to citizenship in a State as the functions of the one government are different from those of the other. Indeed it is a consideration of the sphere of the governments respectively which suggests the rights and privileges as citizens of those entitled to their protection: a citizen of the United States, as such, has the right to demand protection against the wrongful action of foreign authorities; to have the benefit of passports for travel in other countries; to make use in common with all others of the navigable waters of the United States; to participate with others in the benefits of the postal laws, and the like. It would be useless to attempt a general enumeration, but these few may suffice as illustrations, and will suggest others. Such rights and privileges the general government must allow and ensure, and such the several States must not abridge or obstruct;¹ but the duty of protection to a citizen of a State in his privileges and immunities as such is not by this clause devolved upon the general government, but remains with the State itself where it naturally and properly belongs.

§ 1938. It is further declared by this article that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In a country where the rights of the individual citizen were already so well guarded, it might seem like a work of supererogation to establish new guaranties which, after all, in their purpose, must have the same end as others already existing, and in their scope can perhaps embrace no more. But at the time of the English revolution in 1688 it was not deemed unimportant by the able statesmen and profound lawyers who conducted it to a successful conclusion, that a bill of rights should be solemnly agreed upon and promulgated, notwithstanding the Great Charter, with all its restrictions and guaranties, was still the law of the land. The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to

¹ The State courts may nevertheless give a remedy if by a tortious act a person is deprived of a right ensured him under a law of Congress. As, for instance, if a postmaster refuses to deliver mail matter to the person to whom it is addressed. *Teal v. Felton*, 12 How. 284.

watch with too lively a suspicion the propensity of persons in authority to break through the "cobweb chains of paper constitutions."¹ Moreover, it is not entirely clear that this clause is simply cumulative. Without it, might it not be contended with some plausibility, and possibly in some cases with success, that oppressive and tyrannical laws, if they operate professedly upon all, must be held within the province of legislation, because conceding to every one the same measure of privilege and right which is possessed by any?

§ 1939. A popular form of government, as elsewhere has been shown,² does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater, perhaps, may be the danger that excitement and passion will sway the public councils, and arbitrary and unreasonable laws be enacted. Nor are laws necessarily equal and just because professedly they act upon all alike. A general law may establish regulations upon subjects not properly falling within the province of government, and yet be desired and cheerfully submitted to by the majority, who might be inclined, under any circumstances, voluntarily to establish such regulations for themselves; while, on the other hand, the same law might to the minority be in the highest degree offensive, unjust, and tyrannical. Could a law, for instance, for the compulsory attendance of all persons upon the church of the majority, or upon the political meetings of the majority, or upon sports which the majority favored but the minority believed demoralizing, be admissible merely because everybody was included in its command? Would not, on the contrary, its very universality constitute offensive discrimination, precisely because it would compel conformity where equality of right would demand liberty of choice? Nor can it be said that the general terms which are commonly employed in establishing constitutional restraints are always so entirely clear, certain,

¹ See note 2, § 533, *ante*. It is not often that legislatures are so reckless as to disregard, openly and boldly, the restraints of the Constitution from which they derive their authority; but it cannot be denied that sometimes, when desirous to accomplish something that the spirit and intent of the Constitution forbid, they have questioned with close and technical nicety the words employed, in order to discover whether it may not be possible to keep within the letter of the instrument, while defeating its plain and manifest purpose.

² See *ante*, § 1621.

and definite in their meaning as to render such restraints a full, complete, and satisfactory protection, and a safe reliance against partiality and injustice in legislation, if unfortunately at any time passion should usurp the control of public affairs, or corrupt or interested motives be suffered to shape the laws. Conceding, therefore, that if correctly construed, and applied according to their true intent and meaning, other constitutional provisions, State and national, might afford ample security for individual rights, we may nevertheless pardon the anxiety for further prohibitions, and concede that, even if wholly needless, the repetition of such securities may well be excused so long as the slightest doubt of their having been already sufficiently declared shall anywhere be found to exist.

§ 1940. Long before the fourteenth article was ratified, or even thought of, the several States had declared in some form of words, in their constitutions, that no citizen or no freeman should be deprived of life, liberty, or property, without due process of law. Such a declaration was almost as much a matter of course as the apportionment of the powers of government between legislative, executive, and judicial departments. And it may justly be said that this declaration of State constitutional law had, as a rule, been faithfully observed and enforced. Yet, under the altered circumstances of the country, it was not now thought to be sufficient. The difficulty was, that certain classes of persons in some of the States had not been within its protection, either because held as property, and, as such, subject in great degree to the arbitrary dominion of masters, or because, belonging to a proscribed race, they occupied an anomalous position, and were conceded but an imperfect measure of right and privilege. All these persons were now citizens; but their capacity intelligently to exercise the rights and perform the duties of citizenship, or even to provide with prudence and foresight for the wants and necessities of themselves and their families, did not receive immediate recognition from their late masters and rulers, nor perhaps from the people in general. The feeling was prevalent that, even if they were not, — as many thought they were, — as compared with the European races, deficient in natural endowments, still their lack of opportunity to fit themselves for independent and responsible action must make them greatly dependent, and, moreover, that much of the servility and degra-

dation of their former condition must cling to them for a long time, perhaps for generations. Under the influence of such ideas, was there not reason to fear that legislation would be enacted, the actual purpose of which might be, whether avowed or not, or the effect even if not designed, to keep the colored race for a time at least in that condition of pupillage and dependence for which only, as many believed and declared, they were adapted either by nature or acquirements? It was not to be denied — indeed it was notorious — that such a fear prevailed; and that it was not wholly without reason was made apparent in the legislation adopted in some of the States, which undertook to establish peculiar regulations of labor and apprenticeship for the colored people. These regulations assumed the unfitness of that people to act independently and freely on their own behalf, and the consequent necessity of legislating for them as dependent persons. If the public sentiment in any of the States would demand and justify such legislation as being necessary, was there not reason to expect that it would be sustained by the judicial tribunals also? And if sustained and enforced, would not the probable, nay, the inevitable, result be, to perpetuate the degradation of this people, or, at least, to interpose serious obstacles to any efforts which might be made to elevate them to a condition of equality with their fellow-citizens? ¹

§ 1941. The meaning of the phrase “due process of law” has been barely alluded to in another place, in which it is said in effect to affirm the right of trial according to the process and proceedings of the common law.² Without doubt it does affirm

¹ Reference is here made particularly to “An act to regulate the relation of master and apprentice, relative to freedmen, free negroes, and mulattoes,” passed by the legislature of Mississippi, November 22, 1865; the Vagrant Act of the same State, passed November 24, 1865; the “Act to confer civil rights upon freedmen, and for other purposes,” passed in the same State, November 25, 1865, and the supplementary act of December 2d, following; the act discriminating in offences and punishments between white and colored persons, passed in the same State, November 29, 1865, and other legislation somewhat similar in character adopted in the States of Georgia, North Carolina, Alabama, Florida, Virginia, South Carolina, Texas, Tennessee, and Louisiana, in the same and the following year. Military department commanders in some cases issued orders forbidding the enforcement of this legislation and declaring it null, and the prohibitions of the Civil Rights Act, passed April 9, 1866, were expressly designed to cover it.

² *Ante*, § 1789. See *State v. Simons*, 2 Speers, 767.

this in very many cases, but certainly not in all. There are many cases in which it is admissible to take property without giving any trial in the courts, and by modes somewhat arbitrary; and there are also cases in which persons may be deprived of liberty and even of life by other process than that of the common-law courts, and which, nevertheless, is "due process" for the special cases and under the special circumstances. To say, therefore, that due process of law implies a right of trial according to the course of the common law, is to take our general definition of the principle from that which, though its ordinary, is not its universal application, and consequently is in danger of leading us into error.

§ 1942. A little consideration of the cases in which the courts have had occasion to consider and apply this legal phrase, will perhaps enable us to gather the understanding which has prevailed regarding its proper import, and assist us in a proper application in the great variety of new cases which must be constantly arising hereafter.

§ 1943. It has been said that the meaning of the words is the same, in legal effect, with another phrase, which perhaps is even more often employed by legal writers and by jurists, having been taken from the celebrated twenty-ninth chapter of King John, where it was promised as the security of freemen. We refer to the phrase "law of the land."¹ Admitting this identity of meaning, however, we are no nearer an understanding of the purpose and effect of this guaranty than before. What is "the law of the land"? It cannot be the common law merely. Statute law is in the highest sense the law of the land; and the legislative department, created for the very purpose of declaring from time to time what shall be the law, possesses ample powers to make, modify, and repeal, as public policy or the public need shall demand. Such being the case, the question presents itself, whether anything may be made the law of the land, or may

¹ "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers or *the law of the land*." That the meaning of due process of law and of the law of the land is identical, see *Greene v. Briggs*, 1 Curt. C. C. 311; *Murray's Lessee v. Hoboken Land Co.*, 18 How. 276, per Curtis, J.; *State v. Simons*, 2 Speers, 767; *Vanzant v. Waddell*, 2 Yerg. 260; *Wally's Heirs v. Kennedy*, Id. 554; *Ervine's Appeal*, 16 Penn. St. 256; *Banning v. Taylor*, 24 Penn. St. 292; *Parsons v. Russell*, 11 Mich. 129; *State v. Staten*, 6 Cold. 244.

become due process of law, which the legislature, under the proper forms, has seen fit to enact? To solve this question, we have only to consider for a moment the purpose of the clause under examination. That purpose, as is apparent, was individual protection, and limitation upon power; and any construction which would leave with the legislature this unbridled authority, as has been well said by an eminent jurist, "would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose.' In other words, you shall not do the wrong unless you choose to do it."¹

§ 1944. To quote the words of an eminent advocate and statesman: "Everything which may pass under the form of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country." And he gives us a definition of his own in the concise and comprehensive language of which he was so eminently the master: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which

¹ Per Bronson, J., in *Taylor v. Porter*, 4 Hill, 140. And see *Hoke v. Henderson*, 4 Dev. 15; *Kinney v. Beverley*, 1 H. & M. 536; *Arrowsmith v. Burlingim*, 4 McLean, 498; *Lane v. Dorman*, 3 Scam. 238; *Reed v. Wright*, 2 Green, Iowa, 15; *Commonwealth v. Byrne*, 20 Grat. 188.

govern society.”¹ “As to the words from Magna Charta,” says another eminent jurist, “after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.”²

§ 1945. Such have been the views of able jurists and statesmen; and the deduction is, that life, liberty, and property are placed under the protection of known and established principles, which cannot be dispensed with either generally or specially; either by courts or executive officers, or by legislators themselves. Different principles are applicable in different cases, and require different forms and proceedings: in some, they must be judicial; in others, the government may interfere directly and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.³

§ 1946. When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted.

§ 1947. It has already been seen that earlier amendments to the Constitution provide certain safeguards in criminal cases, and that among other things a presentment by grand jury is required in the case of capital or other infamous crimes.⁴ But

¹ Webster *arguendo* in *Dartmouth College v. Woodward*, 4 Wheat. 519; *Works of Webster*, V. 487.

² Per Johnson, J., in *Bank of Columbia v. Okely*, 4 Wheat. 235. And see *State v. Allen*, 2 McCord, 56.

³ Cooley, Const. Lim. 356. We have been unable to give a comprehensive definition which shall be more accurate. See *Wynehamer v. People*, 13 N. Y. 432, per Selden, J.; *Janes v. Reynolds*, 2 Texas, 261, per Hemphill, Ch. J.; *Westervelt v. Gregg*, 12 N. Y. 209, per Edwards, J.; *Sears v. Cottrell*, 5 Mich. 251; *Gibson v. Mason*, 5 Nev. 302.

⁴ Sixth amendment, *ante*, § 1782. In *Ex parte Milligan*, 4 Wall. 120, Mr. Justice Davis, speaking for the majority of the court, says of this sixth article: “These securities for personal liberty thus embodied were such as wisdom and experience had

those amendments apply only to such offences as may be taken cognizance of and punished by the federal government, and not at all to those which are offences only against the peace and dignity of the several States. The States, in the enforcement of their own laws for the preservation of peace and order, may dispense with the grand jury if the legislature shall so provide; and they may make all State offences triable before a single judge, instead of by jury, if that mode of trial shall be thought most politic or most conducive to justice. And no more under the fourteenth article than previously can the federal government interfere with the mode prescribed for the trial of State offences: whatever is established will be due process of law, so that it be general and impartial in operation, and disregard no provision of federal or State constitution. Some cases of minor offences have always been tried summarily without jury, and contempts of court and of legislative bodies have been dealt with in the like manner; but in general the accused will be entitled to the "judgment of his peers," as at the common law, unless that mode of trial is dispensed with by constitution, or, when not required by the constitution, is abolished by statute. The cases of offences against military and martial law are governed by principles that are peculiar, and to a considerable degree arbi-

demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original constitution was proposed for adoption it encountered severe opposition; and but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restless under restraint, and seek, by sharp and decisive measures, to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wits of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

trary; but there are, nevertheless, settled rules which govern their investigation, and the tribunals that punish them must keep strictly within the limits of their jurisdiction, as well in taking cognizance of cases as in proceeding to dispose of them. The common law is over and above all tribunals administering any other code; and is watchful and vigilant to keep them within the limits of their jurisdiction, and to visit them with penalties if they shall usurp authority not belonging to them.¹ And it will be proper to add, that if for any tribunal the guaranties by national or State constitution prescribe any particular process or proceeding for any specified case, the "law of the land" includes such process or proceeding, and includes also the right to have the prosecution conducted according to established forms.²

§ 1948. It cannot be necessary in this place to enumerate and examine in detail the various provisions that are made by the State constitutions for the protection of life and liberty. Some of them are the same with the securities provided by the federal Constitution for cases of accusations by federal authority, and the meaning of which has been considered in previous pages. An accused party is always to be presumed innocent until proved guilty; and though he may be arrested and detained until investigation can be had, he is nevertheless entitled, in all except capital cases, to choose his keepers if he shall give sufficient security that they shall produce him at the proper time for trial. Excessive bail must, therefore, not be required; and the just import of this is, that only sufficient should be demanded to render the production of the accused for trial reasonably certain. And even in capital cases it is in the power of the court to take bail, and it should be taken unless on the preliminary investigation "the proof of guilt is evident or the presumption great."³

§ 1949. An accused person must also be put on trial on some

¹ Hale, Hist. Com. L. 34; 1 Bl. Com. 413; Todd, Parl. Gov. I. 342; *In re Kemp*, 16 Wis. 359. In *Milligan's Case*, 4 Wall. 2, it was decided that not even an act of Congress could authorize a military commission to sit for the trial of offences against the laws in a State where the civil courts were open and their process unobstructed.

² Potter's *Dwarris on Statutes*, 441. On this general subject, see Bishop, Cr. Proc., Index, "Constitutional law;" Cooley, Const. Lim. ch. 10.

³ See *United States v. Hamilton*, 3 Dall. 18; *United States v. Jones*, 3 Wash. C. C. 224; *State v. Rockafellow*, 1 Halst. 332; *Commonwealth v. Sommes*, 11 Leigh, 665; *People v. Smith*, 1 Cal. 9; *State v. Summons*, 19 Ohio, 139; *Foley v. People, Breese*, 31; *Ullery v. Commonwealth*, 8 B. Monroe, 3; *Shore v. State*, 6 Mo. 640; *Moore v. State*, 36 Miss. 137; *Ex parte Banks*, 28 Ala. 89.

regular and established form of accusation. What that must be will depend on the local law. In many of the States there must still be an indictment by grand jury, while in others an information filed by the public prosecutor is allowed to be substituted. The requirement of a presentment by grand jury was once exceedingly important for the security it gave against the institution of unfounded, unjust, and oppressive prosecutions by the government. And though this has been considered a needless precaution under popular institutions, and therefore is done away with in some of the States, the courts will nevertheless exercise a supervision over the proceedings of the public prosecutor, to see that his authority is not exercised unjustly and oppressively.¹ In all the States the accused is entitled to a speedy and public trial by an impartial tribunal; to have the presence, advice, and assistance of counsel in his defence; to be confronted with the witnesses against him;² and is not to be compelled to give evidence against himself. All these requirements are made fundamental and indispensable by the State constitutions; and however much the forms of proceeding or the nature of the tribunal may be changed, due process of law must necessarily include each and all of these requisites. And if conviction follows, the prisoner is entitled to demand that the precise punishment the law has prescribed for his case, and no greater or different, shall be awarded. Unless the law leaves a discretion to the officer, he can exercise none whatever; even a milder punishment than the prescribed penalty, if different in its nature, and not simply constituting a part of that fixed by law, would be wholly inadmissible and illegal.³

§ 1950. It should be observed of the terms, "life," "liberty," and "property," that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. The limbs are equally protected with the life; the right to the pursuit of happiness in any legitimate calling or occupation is as much guaranteed as the right to go at large and move about from place to

¹ See *Curtis v. State*, 6 Cold. 9; *Hurd v. People*, 25 Mich.

² See, as to this, *Goodman v. State*, Meigs, 197; *United States v. Little*, 2 Wash. C. C. 205; *United States v. Ortega*, 4 Wash. C. C. 531; *State v. Thomas*, 64 N. C. 74.

³ *Bourne v. The King*, 7 Ad. & Ell. 58; *Lowenberg v. People*, 27 N. Y. 336; *Whitebread v. Regina*, 7 Q. B. 582.

place. The word "liberty" here employed implies the opposite of all those things which, beside the deprivation of life and property, were forbidden by the Great Charter. In the charter as confirmed by Henry III., no freeman was to be seized, or imprisoned, or deprived of his liberties or free customs, or outlawed or banished, or any ways destroyed, except by the law of the land. The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right. The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also so far as it has been conferred and is possessed. It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom of religious worship, the right of self-defence against unlawful violence, the right freely to buy and sell as others may, or the right in the public schools, found no protection here; or that individuals might be selected out and by legislative act arbitrarily deprived of the benefit of exemption laws, pre-emption laws, or even of the elective franchise. The word, on the other hand, embraces all our liberties — personal, civil, and political. None of them are to be taken away, except in accordance with established principles; none can be forfeited, except upon the finding of legal cause, after due inquiry.¹

¹ Doctor Lieber says: "We should no more think of defining liberty in our constitutions than people going to be married would stop to agree upon a definition of love." *Civ. Lib. and Self-Govt.* It may not be inappropriate here to introduce a definition from Mr. Mill: "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our character; of doing as we like, subject to such consequences as may follow, without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived. No society in which these liberties are not, on

§ 1951. In considering the right to property, it may be remarked that it is a fundamental and universal rule that it cannot be taken from one and passed over to an adverse claimant, by legislative or any other authority, without giving the parties interested a hearing in court. Mr. Justice Story has well said that "that government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the right of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention. We know of no case in which a legislative act to transfer the property of A. to B. without his consent has been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."¹

§ 1952. There are, however, and must be many cases in which the interests of parties may be directly, greatly, and injuriously affected by mere legislative action in entire conformity with the principles of civil liberty which are recognized in free governments. Any change in the general law of the State may

the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest." *Mill on Liberty*, *Introd.*

¹ *Wilkinson v. Leland*, 2 Pet. 657, 658. See also *Bowman v. Middleton*, 1 Bay, 252; *Ervine's Appeal*, 16 Penn. St. 266. The right of private property, as has been justly said, was not "introduced as the result of prince's edicts, concessions, and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm." *Arg. Nightingale v. Bridges, Shower*, 138. And see *Osborn v. Nicholson*, 13 Wall. 654.

affect some persons injuriously: one man is benefited, another is disappointed in his expectations by the same change. "Most civil rights are derived from the public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is vested in the donee."¹ Nothing, therefore, can be clearer than that the rules of descent are subject to be changed by legislative authority, and the modifications may be made to apply to any property not already passed to the heir by the death of the owner. No one is heir to the living; and the promise which the law to-day may hold out to one standing in a particular relation to the owner, that he shall be heir on the owner's death, is only a legislative expression of the present view as to what is proper and politic; an expression which confers no right and is subject to be withdrawn at any time, whenever the view of what is just or politic may change. The same is true of rights expectant under the marriage relation. If by the existing law rights are to be vested in the wife on the death of the husband, or in the husband on the death of the wife, it is nevertheless competent for the legislature at any time to so change the general law as to cut off the expectancy, even as to persons already joined in that relation.²

§ 1953. It is not our purpose in this place to consider at length the subject of vested rights, and the protection thereof against the legislative power of the States.³ A brief reference to general principles, the most of which are familiar, is all that the plan of this work seems to demand, — those principles and the authorities which support them being applicable equally under the Constitution of the Union as amended, and under those of the States, which, as we have before stated, contain the like limitations upon legislative power.

§ 1954. All the property and vested rights of individuals are

¹ Per Woodbury, J., in *Merril v. Sherbourne*, 1 N. H. 213.

² *Moore v. Mayor, &c. of New York*, 4 Sandf. 456; and 8 N. Y. 100; *Westervelt v. Gregg*, 12 N. Y. 208; *Noel v. Ewing*, 9 Ind. 57; *Barbour v. Barbour*, 46 Me. 9; *Lucas v. Sawyer*, 17 Iowa, 517; *Hathorn v. Lyon*, 2 Mich. 93; *Plumb v. Sawyer*, 21 Conn. 351; *Clarke v. McCreary*, 12 S. & M. 347; *Pratt v. Tefft*, 14 Mich. 191.

³ See upon this subject in general, *Cooley's Const. Lim.* ch. 11 and 5; *Potter's Dwarrior on Statutes*, ch. 13.

subject to such regulations of police as the legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be injurious to society or unjust toward other individuals. (a) It has been justly said to be "a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property . . . is held subject to those general regulations which are necessary for the common good and general welfare."¹ And "it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."² Illustrations might be given indefinitely of the proper use and employment of this power in such manner as, though lawful, may greatly circumscribe the use and reduce the value of some one or more species of property, and in some cases even practically annihilate it; but as some of the most striking and forcible of these illustrations are to be found in cases fully considered in the Supreme Court of the United States, and as the general grounds of the decisions may now be assumed to be familiar, we shall not enter upon a discussion of them here. We refer more particularly to the cases in which State laws in restraint of the sale of intoxicating liquors as a beverage have been held not to be in violation of the federal Constitution, notwithstanding the fact that, if rigidly enforced, the result would be to render an important article of commerce practically of little value within the States adopting such laws.³ Indeed in some cases express

¹ *Commonwealth v. Alger*, 7 Cush. 84, per Shaw, Ch. J. See the maxim, "*Sic utere tuo ut alienum non lædas*," explained and illustrated in Broom's *Legal Maxims*, 5 Am. ed. p. 327.

² *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 149, per Redfield, J. See this case for a masterly statement of the police power, its extent and bounds. See also *Vanderbilt v. Adams*, 7 Cow. 351; *People v. Shepard*, 36 N. Y. 286.

³ *License Cases*, 5 How. 504. And see *Brown v. Maryland*, 12 Wheat. 419; *Lin-*

(a) See *Barbieri v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, Id. 703; *Slaughter House Cases*, 16 Wall. 394; *Munn v. Illinois*, 94 U. S. 77; *Webber v. Virginia*, 103 U. S. 344; *Cooley*, Const. Lim., 594, 721-725, 744, 6th ed.; *ante*, §§ 1020 *et seq.*

authority has been given to destroy intoxicating drinks illegally kept for sale; (a) and if proper securities are provided by the law for determining the offence, it is not supposed such laws can be held invalid. The constant invitation to the public to commit a breach of the laws is of itself a serious offence, in the nature of a nuisance, which perhaps cannot otherwise be effectually abated.¹ But in general police laws are only incidentally injurious to property; they do not destroy property, but they compel such reasonable, proper, prudent, and safe use of the same as shall have due regard to the rights of all others.

§ 1955. All rights in property are also subject to such laws as may be passed to compel those who own or enjoy it to contribute their proportion to the public burdens by way of taxation. The taxing power of the State is a tremendous power, which, if the exigencies of the government require, may be exerted in imposing a tax upon property within the jurisdiction of the State which imposes it to any extent which the will of the legislative authority may prescribe.² Yet this power is subject to the control of certain principles which lie at its foundation; it must in good faith be exercised for public purposes and not for private, and the taxes must be levied upon some system of impartiality and uniformity, with a view to the just apportionment of the burden. All imposition on other grounds or for other purposes would be not taxation, but plunder.³

§ 1956. Every species of individual property is also subject to be appropriated for the special needs of either the State or national government, whenever any particular parcel thereof is demanded for any public object. Here, again, the power to appropriate is subject to certain restrictions; it must not be exercised without making due compensation for whatever is taken; no more must be appropriated than is necessary; and if compen-

coln v. Smith, 27 Vt. 335; Bradford v. Stevens, 10 Gray, 379, State v. Robinson, 49 Me. 285; Reynolds v. Geary, 26 Conn. 179; Jones v. People, 14 Ill. 196; Santo v. State, 2 Iowa, 202; Commonwealth v. Kendall, 12 Cush. 414; Cooley, Const. Lim. 583 and cases cited; Potter's Dwaris on Statutes, ch. 14.

¹ Cooley, Const. Lim. 583 and cases cited. See, however, Wynehamer v. People, 13 N. Y. 378; Meshmeier v. State, 11 Ind. 484.

² Weston v. Charleston, 4 Pet. 449; Bank of Commerce v. New York, 2 Black, 631; McCulloch v. Maryland, 4 Wheat. 431; The Collector v. Day, 11 Wall. 113.

³ Sharpless v. Mayor, &c., 21 Penn. St. 168; Tyson v. School Directors, 51 Penn. St. 9; Opinion of Judges, 58 Me. 570.

(a) See Kidd v. Pearson, 128 U. S. 1.

sation is not agreed upon it must be assessed by some impartial tribunal, and cannot be arbitrarily fixed by State authority. And in this as well as all other cases in which the owner may be deprived of his property by proceedings *in invitum*, the law authorizing such proceedings must be complied with in all its essential requirements or the proceedings will be ineffectual.¹ Due process of law requires, *first*, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and *secondly*, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property-owner, except as he may see fit voluntarily to waive them.² The propriety of these rules is too obvious to require any discussion or elucidation.

§ 1957. There are some other cases in which the intervention of the legislature to affect the rights of parties has been sustained, that may at first view appear more questionable than those just referred to. But when the principle that underlies them is seen and understood, there is no difficulty in accepting them as sound and the principle itself as safe. The limitation upon such intervention is, that vested rights are not to be disturbed; but, as has been well remarked, "courts do not regard rights as vested contrary to the equity and justice of the case."³ A party has no vested right in a rule of law which would give him an inequitable advantage over another; and such rule may therefore be repealed and the advantage thereby taken away. To illustrate this remark: If by law a conveyance should be declared invalid if it wanted the formality of a seal; or a note void if usurious interest was promised by it; or if in any other case, on grounds of public policy, a party should be permitted to avoid his contract entered into intelligently and without fraud, there would be no sound reason for permitting him to claim the protection of the Constitution, if afterwards, on a different view of public

¹ *Williams v. Peyton*, 4 Wheat. 77; *Thatcher v. Powell*, 6 Wheat. 119; *Beaty v. Knowler*, 4 Pet. 168; *Early v. Doe*, 16 How. 610; *Rule v. Parker*, 1 Cooke, 365; *Parker v. Overman*, 18 How. 137.

² 1 Redfield on Railw. 239-241; *Cooley*, Const. Lim. ch. 15; *Potter's Dwarries on Statutes*, ch. 11.

³ *State v. Newark*, 3 Dutch. 197. Or, as is said elsewhere, a party cannot have a vested right to do wrong. *Foster v. Essex Bank*, 16 Mass. 245.

policy, the legislature should change the rule, and give effect to his conveyance, note, or other contract, exactly according to the original intention.¹ Such infirmities in contracts and conveyances are often cured in this manner, and with entire justice; and the same may also be done with defects in legal proceedings occasioned by mere irregularities. Where a court or its officers, in a case of which the court has full jurisdiction, have failed to observe strictly the rules of procedure which are prescribed for the orderly conduct of affairs, and in consequence thereof a party, who was in no way injured by the irregularity, is nevertheless in position to take advantage of the error to avoid the proceedings, it is often not only just but highly proper that the legislature should interfere and cure the defect by validating the proceedings.² And if this may be done in proceedings which concern only private parties, it may be done in case of errors in the proceedings of corporations and of public bodies. Retrospective legislation to cure their irregularities is not forbidden by the clause of the amendment now under discussion, nor under any provision of the federal Constitution. It must nevertheless be conceded — as has often been remarked when such legislation has been under discussion — that it is peculiarly liable to abuse in these as well as in all other cases; and in some States it has been deemed wise to prohibit retrospective laws entirely.³

§ 1958. But it cannot be necessary to go more particularly, in this place, into an enumeration of the cases in which the legislature may change a rule of law in order to take away a remedy which, resting upon mere technical reasons, it might be unjust to insist upon; or to perfect a remedy which otherwise might have been defeated. The rules which determine the legislative power in such cases are broad rules of right and justice;

¹ *Satterlee v. Mathewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Pet. 88; *Carpenter v. Pennsylvania*, 7 How. 456.

² See *Kearney v. Taylor*, 15 How. 494; *Goshen v. Stonington*, 4 Conn. 224; *Chesnut v. Shane's Lessee*, 16 Ohio, 599; *Davis v. State Bank*, 7 Ind. 316; *Underwood v. Lilly*, 10 S. & R. 97; *Selsby v. Redlon*, 19 Wis. 17; *Parmelee v. Lawrence*, 48 Ill. 331; *State v. Union*, 33 N. J. 355; *Bristol v. Supervisors, &c.*, 20 Mich. 93. But the legislature cannot, on pretence of curing defects in legal proceedings, make good those which have been had without jurisdiction. See *Denny v. Mattoon*, 2 Allen, 261; *McDaniel v. Correll*, 19 Ill. 226; *Hart v. Henderson*, 17 Mich. 218.

³ See § 1398 *ante*. See the subject of retrospective laws in general considered in *Smith, Stat. and Const. Construction*, 289-309; *Sedgwick, Stat. and Const. Law*, 188, 406, 680; *Cooley, Const. Lim.* 369-383; *Potter's Dwarrior on Stat.* 163-166.

and it is not often, when there is occasion to apply them, that there can be difficulty in discerning plainly the line of constitutional limitation.¹

§ 1959. The provision that no State "shall deny to any person within its jurisdiction the equal protection of the laws" would not seem to call for much remark. Unquestionably every person — all being now freemen — is entitled to the equal protection of the laws without any such express declaration. But with the power in Congress to enforce this provision by "appropriate legislation," it becomes a matter of no little importance to determine in what consists the equal protection of the laws, and what amounts to a denial thereof.

¹ Those laws which compel the owner of land who has recovered it from an adverse possessor to pay for the betterments which the latter has made in good faith thereon, have sometimes been assailed as being forbidden by the requirement of due process of law; but the courts have sustained them. See particularly the cases of *Brown v. Storm*, 4 Vt. 37, and *Ross v. Irving*, 14 Ill. 171; and for the limit to such laws, *McCoy v. Grandy*, 3 Ohio, N. S. 463; *Childs v. Shower*, 18 Iowa, 261.

So the special statutes which in particular cases have authorized the guardians of minors, or other persons standing in fiduciary relations, to make sale of the property of their wards or other *cestuis que trust*, in order to accomplish the purposes of their trust, have also been attacked on the ground that due process of law required judicial proceedings to give the authority; but the courts have held otherwise. See *Wilkinson v. Leland*, 2 Pet. 660; *Watkins v. Holman's Lessee*, 16 Pet. 25; *Suydam v. Williamson*, 24 How. 427; *Williamson v. Suydam*, 6 Wall. 723; *Florentine v. Barton*, 2 Wall. 210; *Rice v. Parkman*, 16 Mass. 326; *Cochran v. Van Surlay*, 20 Wend. 373; *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369; *Doe v. Douglass*, 8 Blackf. 10; *Carrol v. Olmstead's Lessee*, 16 Ohio, 251; *Thurston v. Thurston*, 6 R. I. 296; *Williamson v. Williamson*, 3 S. & M. 715; *Estep v. Hutchman*, 14 S. & R. 435; *Dorsey v. Gilbert*, 11 G. & J. 87; *Kirby v. Chetwood's Adm'rs*, 4 T. B. Monr. 91; *Snowhill v. Snowhill*, 2 Green, Ch. 20; *Moore v. Maxwell*, 18 Ark. 469. There are many other cases which support these.

The legislature may cut off rights by statutes of limitation where they are not asserted in a time specified; but this must be such time as will give an opportunity to assert them. *Mitchell v. Clark*, 110 U. S. 633; *Call v. Hagger*, 8 Mass. 423; *Proprietors, &c. v. Laboree*, 2 Greenl. 294; *Society, &c. v. Wheeler*, 2 Gall. 141; *Blackford v. Peltier*, 1 Blackf. 36; *Thornton v. Turner*, 11 Minn. 339; *Price v. Hopkin*, 13 Mich. 318; *Morton v. Starkey*, *McCahon* (Kan.) 113; *Berry v. Ramsdell*, 4 Met. (Ky.) 296; *Osborn v. Jaines*, 17 Wis. 573. And when a right has thus been once cut off, the legislature cannot revive it by a repeal of the law. *Brent v. Chapman*, 5 Cranch, 358; *Newby's Adm'rs v. Blakey*, 3 H. & M. 57; *Parish v. Eager*, 15 Wis. 532; *Bagg's Appeal*, 43 Penn. St. 512; *Leffingwell v. Warren*, 2 Black, 599. But a statute of limitations may be repealed. *Campbell v. Holt*, 115 U. S. 620.

Penalties given by statute may be taken away by statute. *Oriental Bank v. Freeze*, 6 Shep. 109; *Welch v. Wadsworth*, 30 Conn. 149; *O'Kelly v. Athens Manuf. Co.*, 36 Ga. 61; *Curtis v. Leavitt*, 15 N. Y. 9; *Engle v. Shurtz*, 1 Mich. 150; *Confiscation Cases*, 7 Wall. 454.

§ 1960. It is to be observed first, that this clause, of its own force, neither confers rights nor gives privileges: its sole office is to ensure impartial legal protection to such as under the laws may exist. It is a formal declaration of the great principle that has been justly said to pervade and animate the whole spirit of our constitution of government, that all are equal before the law,¹ — a principle, nevertheless, which must needs be applied with some reserve and caution. "When it comes to be applied," says the same eminent authority, "to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions, and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security. What those rights are to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend upon laws adapted to their respective relations and conditions."²

§ 1961. But though there may be discriminations between classes of persons where reasons exist which make them necessary or advisable, there can be none based upon grounds purely arbitrary. The law, for instance, may, with manifest propriety, establish the age of majority, and declare that such as have not reached it shall be incapable of entering into contracts; but no one would undertake to defend upon constitutional grounds an enactment that, of the persons reaching that age, those possessing certain physical characteristics, in no way affecting their capacity or fitness for general business or impairing their usefulness as citizens, should remain in a condition of permanent disability. Such an enactment would assail the very foundations of a government whose fundamental idea is the equality of all its citizens. And now that it has become a settled rule of constitutional law that color or race is no badge of inferiority and no test of capacity to participate in the government, we

¹ Shaw, Ch. J., in *Roberts v. Boston*, 5 Cush. 206.

² *Ibid.* This subject is considered by the writer in his work on *Constitutional Limitations*, pp. 389-397. See the learned argument of Mr. Sumner in *Roberts v. Boston*, given in full in his works, II. 327.

doubt if any distinction whatever, either in right or in privilege, which has color or race for its sole basis, can either be established in the law or enforced where it had been previously established.

§ 1962. Congress by the act of April 20, 1871, to enforce the provisions of this article, has assumed that there may be a denial of the equal protection of the laws in other ways than by the direct denial of the State. The third section of that act declares, "That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof and of the United States as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities or protection named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall from any cause fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States." And it proceeds thereupon to make provision for such a contingency.

§ 1963. The second section of the fourteenth article provides, that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for choice of electors of President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." This article, it will be remembered, was adopted before colored persons generally were admitted to the privileges of suffrage, and this section thereof was intended to preclude the States which denied them that privilege from having the benefit of their numbers as a basis for representation. It will be manifest from its terms that the immediate occasion for its adoption passed away

on the ratification of the succeeding article, and its importance, if any, will depend upon future events.

§ 1964. The third section declares that "No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability."¹ The disability here imposed has been removed by Congress in the great majority of cases, and it is reasonable to suppose will be continued longer in few, if any. It must be conceded that large numbers — perhaps the great majority — of those who engaged in the attempt to sever their connection with the Union, did so under the sincere conviction that, though this remedy for their grievances might be extra-constitutional, it was nevertheless matter of strict right; and when it was settled, as practically it soon was, that criminal prosecutions were not to be pressed to the conviction of any persons for the attempt, the policy of proscribing any class, and disqualifying them from participation in the government, was by no means universally conceded.² And at

¹ A State may provide for judicially inquiring into the holding of a State office in violation of this provision. *State v. Watkins*, 21 La. Ann. R. 631.

² Among the first to deny the policy of disabilities was Governor Andrew, of Massachusetts. In his valedictory address as governor, in which he urged the justice and necessity of conferring the right of suffrage on the African race, he says of the States lately in rebellion: "We are desirous of their reorganization, and to end the use of the war power. But I am confident we cannot reorganize political society with any proper security: *first*, unless we let in the people to a co-operation, and not merely an arbitrarily selected portion of them; *second*, unless we give those who are by their intelligence and character the natural leaders of the people, and who surely will lead them by and by, an opportunity to lead them now." And again: "There ought now to be a *vigorous prosecution of the peace*, — just as vigorous as our recent prosecution of the war. We ought to extend our hands with cordial good-will to meet the proffered hands of the south; demanding no attitude of humiliation from any; respecting the feelings of the conquered, — notwithstanding the questions of right and wrong between the parties belligerent. We ought, by all the means and instrumentalities of peace; by all the thrifty methods of industry; by all the recreative agencies of education and religion, to help rebuild the waste places, and

this time the conviction appears to be general among all parties that the period when disabilities can be needful and politic — conceding it to have once existed — has passed away.

§ 1965. To the same amendatory article it was regarded important to add a fourth section, which should have for its chief object to protect the credit of the nation, *first*, by affirming the unquestionable character of the national indebtedness, and *second*, by precluding the assumption by the nation of obligations with which it could not with any justice be burdened, but which nevertheless, it was possible that a combination of interests might otherwise, at some future time, succeed in fastening upon it. Incidentally, it was deemed wise also to protect the States against the same danger. The section is as follows: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void." If any one were to challenge the justice or propriety of any portion of this section, we should expect it to be that portion which relates to claims for the loss or emancipation of slaves. We have had occasion already to allude to the fact that early in the war, President Lincoln, with the approval of Congress, proposed to the loyal slave-holding States that the government should furnish them pecuniary aid in emancipation, but that no disposition was manifested to accept the offer, and the slaves were finally emancipated without provision for such aid.¹

restore order, society, prosperity. The offence of war has met its appropriate punishment by the hand of war. In this hour of triumph, honor and religion alike forbid one act, one word of vengeance or resentment. Patriotism and Christianity unite the arguments of earthly welfare, and the motives of heavenly inspiration, to persuade us to put off all jealousies and all fear, and to move forward as citizens and as men in the work of social and economic reorganization, each doing with his might what his hand findeth to do."

¹ An exceedingly interesting question has recently passed under review in the Supreme Court, on which this provision as well as the preceding amendment was thought to have some bearing. In the constitutions of some of the States which were prepared and adopted under the reconstruction acts were contained provisions to preclude any recovery on contracts the consideration for which was the sale or hire of

§ 1966. As a general rule, governments do not and cannot reasonably be expected to make compensation for losses occasioned by war, whether those purposely inflicted upon their enemies or incidentally upon their friends; and although it could not be said that slavery had been wholly destroyed by the war, yet as it was very generally regarded as the exciting cause of the rebellion, and its complete destruction thought essential to the restoration of harmony and the permanent security of the Union, it is not surprising that the nation, which had suffered so severely in consequence of its existence, should be disposed to treat its destruction as that of a public enemy, and to feel peculiarly sensitive upon the possibility of being compelled at any time, or having any of its members compelled, to pay damages for its overthrow.

slaves. Thus the constitution of Georgia provided, "That no court or officer shall have, nor shall the general assembly give, jurisdiction to try or give judgment on, or enforce any debt the consideration of which was a slave or the hire thereof." Suits were, nevertheless, brought upon such, and the State courts, acting under these provisions, gave judgment against the plaintiffs, which were removed to the Supreme Court on an allegation that the obligation of contracts was impaired thereby. It was contended in support of the Georgia judgment —

"1. That when the Constitution of 1868 was adopted, Georgia was not a State of the Union, that she had sundered her connection as such, and was a conquered territory, wholly at the mercy of the conqueror; and that hence the inhibition of the States by the Constitution of the United States to pass any law impairing the obligation of contracts had no application to her.

"2. That her constitution does not affect the contract, but only denies jurisdiction to enforce it.

"3. That her constitution was adopted under the coercion and dictation of Congress, and is the act of Congress rather than of the State; and that, though a State cannot pass a law impairing the validity of contracts, Congress can; and that, for this reason also, the inhibition of the Constitution of the United States has no effect in the case."

In *White v. Hart*, 13 Wall. 646, the court, Mr. Justice Swayne delivering the opinion, adjudged these positions wholly untenable. Georgia, it was held, had never been out of the Union; and though its rights under the Constitution had been suspended, to bring her back into full communion with the loyal States nothing was necessary but to permit her to restore her representation in Congress. The action of Congress in the premises cannot be inquired into, but must be accepted and followed by the judicial department. But Congress could not sanction and legalize a violation of the federal Constitution. Contracts for the sale or hire of slaves effected before emancipation were valid, and to take away all remedy for their enforcement impaired their obligation. A provision to that effect was consequently null, and the holders of such contracts might proceed as if it had never had an existence. The same views were reaffirmed in *Osborn v. Nicholson*, 13 Wall. 654, arising under the constitution of Arkansas.

From these judgments Chief Justice Chase dissented, contenting himself with stating his conclusions as they are given in note to § 1927 *supra*.

§ 1967. The fifth paragraph of this article gives Congress the power to enforce the provisions thereof by appropriate legislation. This power has been exercised in the passage of a very stringent enactment, from which a quotation has already been made, but which is of sufficient importance to be given in full below.¹

¹ " *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes.*

" Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress ; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled ' An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases.

" § 2. That if two or more persons within any State or territory of the United States shall conspire together to overthrow or to put down or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat, to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States, contrary to the authority thereof, or by force, intimidation, or threat, to prevent any person from accepting or holding any office, or trust, or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat, to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat, to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat, to influence the verdict, presentment, or indictment of any juror or grand-juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or

§ 1968. Such are the provisions of the fourteenth amendment. Important as they unquestionably are, it is nevertheless to be

shall conspire together for the purpose of, in any manner, impeding, hindering, obstructing, or defeating the due course of justice in any State or territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat, to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully-qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such person in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States, or district or supreme court of any territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication.'

"§ 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State, shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, immunities, or protection named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States, or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district to be dealt with according to law.

"§ 4. That whenever in any State or part of a State the unlawful combinations

observed that they have not been agreed upon for the purpose of enlarging the sphere of the powers of the general government, or

named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of *habeas corpus*, to the end that such rebellion may be overthrown: *Provided*, That all the provisions of the second section of an act entitled 'An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases,' approved March third, eighteen hundred and sixty-three, which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section; *Provided further*, That the President shall first have made proclamation, as now commanded by law, commanding such insurgents to disperse; *And provided also*, that the provisions of this section shall not be in force after the end of the next regular session of Congress.

"§ 5. That no person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act, who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the pains and penalties declared against that crime; and the first section of the act entitled 'An act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts,' approved June seventeenth, eighteen hundred and sixty-two, be, and the same is hereby, repealed.

"§ 6. That any person or persons, having knowledge that any of the wrongs conspired to be done, and mentioned in the second section of this act, are about to be committed, and having power to prevent, or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons, by reasonable diligence, could have prevented; and such damages may be recovered in an action on the case, in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action: *Provided*, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person

of taking from the States any of those just powers of government which in the original adoption of the Constitution were "reserved to the States respectively." The existing division of sovereignty which had been found equal to the preservation of our liberties, not only in times of peace and general harmony but in the trials of a most desperate civil strife, is not disturbed by it. It does, indeed, prohibit the States from exercising certain powers upon their citizens; but unless we are wholly mistaken in our assertion that they are not powers which the people, in framing free republican governments, are accustomed to intrust to their rulers, it will be perceived that the provisions of this article are not to be regarded as limitations upon power, but rather as precautions against possible usurpation and tyranny. The things forbidden were already forbidden by the fundamental principles of the social compact, and beyond the sphere of the legislative authority alike of the States and of the nation.¹ It still remains true as before that the exercise of the local sovereignty is left with the States; and it is only when the essential principles of republican government are, in some State, as regards some portion of the people, purposely disregarded, or, by connivance of the authorities or otherwise, suffered to be set aside by unlawful violence; when, in other words, the State purposely abuses its functions in the oppression of individuals, or systematically refuses or neglects to employ its functions in giving protection to any class of its citizens, that the fourteenth amendment to the Constitution of that common government which, "for general purposes," is "over the whole," interposes its command to prevent the wrong. This article has not been agreed upon in order to centralize power, but to preclude such a possible abuse of power as might result from prejudice or other

shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.

"§ 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

"Approved April 20, 1871."

¹ The language of the Supreme Court in *Osborn v. Nicholson*, 13 Wall. 662, in which an act forbidding a remedy upon contracts was under discussion, is here given.

unworthy motive. The States, in adopting it, have not struck blindly and fatally at their reserved powers; they have rather given security that in certain important particulars they will not pervert or abuse them.¹

¹ To whatever school of construction our statesmen have belonged, they have generally been agreed in one thing, — that the chief excellence of our system of government consists in its apportionment of powers, and that the perpetuation of this should be matter of primary solicitude. Mr. Everett expresses the fundamental idea of our system in his *History of Liberty*. "The framers of the Constitution," he says, "devised a scheme of confederate and representative sovereign republics, united in a happy distribution of powers, which, reserving to the separate States all the political functions essential to local administration and private justice, bestowed upon the general government those and those only required for the service of the whole." *Speeches and Orations*, I. 167. Mr. Webster may also be quoted: "Circumstances," he says, "have wrought out for us a state of things which, in other times and other regions, philosophy has dreamed of, and theory has proposed, and speculation has suggested, but which man has never been able to accomplish. I mean the government of a great nation over a vastly extended portion of the surface of the earth, by means of local institutions for local purposes and general institutions for general purposes. I know of nothing in the history of the world, notwithstanding the great league of Grecian states, notwithstanding the success of the Roman system, — and certainly there is no exception to the remark in modern history, — I know of nothing so suitable on the whole for the great interests of a great people, spread over a large portion of the globe, as the provision of local legislation for local and municipal purposes, with, not a confederacy, nor a loose binding together of separate parts, but a limited, positive, general government, for positive, general purposes, over the whole." *Webster's Works*, II. 207. Peculiarly forcible in the same connection is the language of Mr. Jefferson. "The States," he says, "as well as their central government, like the planets revolving round their common sun, acting and acted upon according to their respective weights and distances, will produce that beautiful equilibrium on which our Constitution is founded, and which I believe it will exhibit to the world in a degree of perfection unexampled but in the planetary system itself. The enlightened statesman, therefore, will endeavor to preserve the weight and influence of every part, as too much given to any member of it would destroy the general equilibrium." *Letter to Fitzhugh*, Works, IV. 217. What was true when this was written is true still. The government is not revolutionized by the new amendments to the Constitution; it is but adapted to new conditions. The dangerous excrescence of slavery has been cut off, and these are but to heal the wound.

CHAPTER XLVIII.

BY T. M. COOLEY.

IMPARTIAL SUFFRAGE ESTABLISHED.

§ 1969. THE fifteenth article of the amendments, and the last which hitherto has been deemed important in adapting the Constitution to the new conditions following the emancipation of the slaves, declares that "The right of citizens of the United States to vote shall not be denied or abridged, by the United States or by any State, on account of race, color, or previous condition of servitude,"¹ and that "the Congress shall have power to enforce this article by appropriate legislation."²

¹ Mr. Sumner in the Senate raised the question of the value of this amendment, and disputed the right of any State to deny suffrage on account of color. "I raise," he said, "no question of the power of the States to regulate suffrage; I go into the question of the meaning of the Constitution of the United States, and I insist that, under that, you cannot, without falsifying every rule of interpretation which will be found in any book of jurisprudence, without falsifying every sentiment of the heart, say that under the power to regulate you can disfranchise a race. Every presumption is to be in favor of human rights. Some of the bravest sentiments of English jurisprudence have all gone in that direction, even to the extent of saying that that man is impious and cruel who does not favor human rights. There I stand in every interpretation of the Constitution; in the construction of every word and phrase in it, I give to it a meaning in favor of human rights; and when I am asked what is meant by the term 'to regulate,' I say, to determine the manner of elections; not to disfranchise a race. When I am asked what may be qualifications, I say clearly, those things which may be acquired, those things which are attainable to human effort; not those things which, by the providence of God, are unattainable. Sir, it is an insult to God and to humanity to say that such a thing can be a qualification." Debate of Feb. 3, 1869. Mr. Senator Edmunds, in the same debate, argued that the

² Adopted in Congress, February 26, 1869, and published and ratified by the requisite three-fourths of the States, March 30, 1870. Very stringent acts "to enforce the rights of citizens of the United States to vote in the several States of this Union," were passed May 31, 1870, and February 28, 1871. See *Ex parte Yarborough*, 110 U. S. 651; *United States v. Waddell*, 112 U. S. 76; *Neal v. Delaware*, 103 U. S. 370 (the amendment overrides State constitutions). The fifteenth amendment does not confer the right of suffrage; it prevents preference on account of race, color, or previous servitude. *United States v. Reese*, 92 U. S. 214.

§ 1970. Previous to the emancipation of the slaves, the great majority of the States did not admit persons of African descent, even though freemen, to the exercise of the elective franchise,¹ and those which did assumed the general inferiority of the race, and required some special evidence of fitness; such, for instance,

elective franchise was assured by the fourteenth amendment. "I am one of those," he said, "who believe that the fourteenth amendment, which we have already adopted, has undertaken to secure to citizens of the United States all the privileges and immunities that belong to citizens as such, including, of course, and comprehending all belonging to the class. There is no qualification or limitation; but words the most comprehensive possible in a statute or in a constitution are used. I believe that every citizen of the United States, in respect to whom political rights can be asserted at all, is entitled now to exercise political privileges; and, therefore, if there is any man in the United States who was before that amendment entitled to exercise political privileges, that amendment extended to all the citizens similarly situated, without arbitrary and mere fanciful distinctions, such as color, nativity, education, or of religion, an equal right; because, if there is any vitality at all in that article, which was so much studied here, and which at last has commanded the assent of three-fourths of the States, it is that it gave the great and comprehensive word 'privileges' to all citizens alike, and that it made secure to them the privileges that belonged to the highest class of community." But these views did not command the assent of Congress, nor, probably, of any large portion of the public.

¹ The terms of exclusion were different in different States, but an examination of the laws and judicial decisions will show that there was always more or less difficulty in determining whether particular classes of persons of mixed blood should be ranged on one side or the other of a proper dividing line between the European and African races. Sometimes this was sought to be settled by the State legislation; in other cases the legislation only introduced confusion. Thus, by an early statute in Virginia, a person not of pure negro blood, but having one-fourth part or more, was deemed a mulatto. 4 Randolph, 631. The Indiana statutes adopted the same rule. But in Massachusetts (*Medway v. Natick*, 7 Mass. 88) and Alabama (*Thurman v. State*, 18 Ala. 276) it is decided that a mulatto is a person begotten between a white and a black; and one having a fourth only of negro blood is not a mulatto. In South Carolina persons tinged with negro blood were held not to be whites. *State v. Hayes*, 1 Bailey, 275; *State v. Davis*, 2 Bailey, 558. In Michigan, where statutes had always spoken of negroes, mulattoes, and *other colored persons*, it was held that these terms were satisfied by the three classes of negroes, mulattoes, and quadroons, and all having less than one-fourth negro blood should be regarded as white. *People v. Dean*, 14 Mich. 406. See also *Dean v. Commonwealth*, 4 Grat. 541; *Gentry v. McMinnia*, 3 Dana, 385; *Johnson v. Norwich*, 29 Conn. 407, which afford more or less support to the same view. In Georgia, persons having less than one-eighth negro blood were held to be white: *Bryan v. Walton*, 20 Ga. 480; while in North Carolina, one having a sixteenth negro blood was decided not to be. *State v. Charon*, 5 Jones Law, 11. In Ohio, quadroons were held to be "white:" *Gray v. State*, 4 Ohio, 354; *Thacker v. Hawk*, 11 Ohio, 376; *Jeffries v. Aukeny*, 11 Ohio, 372; *Lane v. Baker*, 12 Ohio, 287; though the correctness of this ruling was questioned in *Van Camp v. Board of Education*, 9 Ohio, N. S. 406, and was denied in *Smith v. Oliver*, 31 Ala. 39. These references will sufficiently illustrate the diversity of opinion on this subject.

as might be afforded by the ownership of freehold property to a certain amount or value. It was natural, and perhaps inevitable, so long as the general condition of colored persons was one of dependence, servitude, and ignorance, that their unfitness to participate in the government should be taken as unquestionable; and it could not be expected that this impression would be removed immediately by the mere act of elevating them to the condition of freemen. Freedom could not immediately make them wise, it could not give them political knowledge, it could not instruct them in the institutions of the country; and for a time, at least, they must be wanting in a due sense of the rights, privileges, and responsibilities of freemen, in the habit of self-control, and in the broad views essential to a proper exercise of an elector's privileges.¹ Moreover, it was not unreasonable to expect that something of the feelings, sentiments, and passions begotten of slavery would linger after its overthrow, and preclude the freedmen coming at once into harmonious and satisfactory relations with the lately dominant race as fellow-citizens.

§ 1971. Important as these considerations were, they were not believed sufficient to justify the exclusion of the colored people from the polls. To continue against them discriminations based upon color was to perpetuate a feeling of degradation, which could not fail to constitute a serious impediment to the very preparation for the elective franchise the want of which was now the principal reason for denying it. Moreover, to leave them without political privileges was to place them at a serious disadvantage wherever and in whatsoever manner they came in competition with others; and the sentiment from the first was strong, and soon came to prevail among the people, that the ballot was absolutely essential to their protection against oppression and wrong in a thousand forms where the general law would be powerless, and that it must constitute the chief incitement to the efforts needed in the direction of intellectual and moral improvement. And there were not wanting abundant reasons for believing that in any political society the existence of a large class, branded without their fault with a mark of legal inferiority, could not fail to be a circumstance tending to public disorder, wrong, and danger. The discrimination against the colored

¹ All this is assumed in the special message of the President announcing to Congress the ratification of this amendment.

people at the polls was now the last remaining badge of their late servitude, and the wrong done them by their enslavement could not be fully atoned for while it was continued. It might be highly desirable that the individual States should take action to abolish it; but while many were ready to do so, in others public sentiment was not yet fully aroused to the justice, necessity, or expediency of such a step; and an amendment to the federal Constitution was consequently the only method in which the reform could be speedily, completely, and effectually accomplished.

§ 1972. What is particularly noticeable in the case of this article is the care with which it confines itself to the particular object in view. The pressure of a particular evil was felt; the reproach of a great wrong was acknowledged; and that evil was to be remedied, and that wrong redressed. There was no thought at this time of correcting at once and by a single act all the inequalities and all the injustice that might exist in the suffrage laws of the several States. There was no thought or purpose of regulating by amendment, or of conferring upon Congress the authority to regulate, or to prescribe qualifications for, the privilege of the ballot. From the beginning the States had exercised that authority, and however diverse had been their action, there was no complaint of any resulting evil which in any case had become of national importance except the single one at which this article was aimed. The correction of this was consequently the immediate need, and whatever else was wrong or impolitic might properly be left to the action of the States where the subject was left when the Constitution was framed. At their hands, it may be trusted, will whatever else is unequal in due time be corrected, and whatever is inconsistent with republican institutions be discarded.¹

§ 1973. This last amendment crowns the edifice of national liberty. Freedom is no longer sectional or partial. There are no longer privileged classes; the laws have ceased to be invid-

¹ Soon after the adoption of this amendment (July 14, 1870), Congress amended the naturalization laws so as to extend them "to aliens of African nativity, and to persons of African descent;" their benefits were confined previously to white persons. The same act contains important provisions, which give to the federal authorities a certain supervision and the right to take charge of the preservation of order at elections in towns of 20,000 inhabitants or more, when representatives in Congress are to be chosen.

ious, and all classes of citizens who are to be governed by them are admitted also to participate in their administration.¹

§ 1974. The question may indeed be raised, whether it be not possible that we have plunged into new dangers in laying thus broadly the basis of responsible citizenship. There are those who foresee only evil, and who prophesy only calamity. But evil is always prophesied when concession is made to democracy: when kings are set aside, when hereditary privileges are abolished or restricted, when the press is unmuzzled, when the conscience is set free. It was prophesied in England, when toleration was extended to dissenters from the Established Church, and again when the Catholics were emancipated, and again when political rights were extended to the Jews. Every step in that country towards making the Parliament a truly representative body of the whole nation, every disfranchisement of decayed or corrupt boroughs, and every extension of the franchise to the people, has been earnestly opposed as fraught with danger to the state. Every step in America in the same direction has met with the like opposition. The rulers, whether they be kings or lords or privileged classes, always believe they rule by right divine. Power is safe in their hands, but it would be dangerous in the hands of the people at large: this is the assumption always when the demands of new classes for a voice in the government are to be resisted. The American people have assumed that that which is most just is also the wisest and safest, and they trust to time and experience to justify their confidence. It is beyond question that many unfit persons will demand and exercise the right of suffrage, but no test that could be prescribed — whether of education, property, experience, race, or color — could be completely effectual in separating out the fit from the unfit, the virtuous from the vicious, the patriotic and public-spirited from the selfish, mercenary, and mean.

§ 1975. It may be well for the country and for the experiment we enter upon that a new generation is already coming upon the stage, whose political training was going on while the artillery

¹ It was proposed in Congress to make the amendment embrace the right to hold office also, but this was finally omitted. It was doubtless believed that when the ballot was given, the very numbers and strength of the class would constitute a sufficient protection against any exclusion. But even if the disposition should exist to establish any, we doubt if it could be supported in view of the provisions of the fourteenth amendment.

of civil war was battering down old prejudices, and the nation was staking its existence upon the emancipation of a race it had before despised. To such a training there were different surroundings from those which in some particulars operated to narrow the ideas and shape the action of the founders of the government. Liberty to those who are henceforth to govern America has a broader meaning than formerly, and they accept the equality of man as a practical fact, and not as being, in any particular, merely a beautiful theory. To them all the evils and all the discredit of slavery, and all the jealousies, prejudices, and heart-burnings which sprung from it, are only things which have served to darken a page of our national history, as the executions for witchcraft and the persecutions for the unlicensed worship of the Supreme Being have darkened others; but upon that page has been turned over a new and unsullied leaf, upon which a nation, purified by suffering, may hereafter record a history inspired by the impulses of enlightened and impartial humanity. The compromises between right and wrong under the pretence of expediency have disappeared; the house is no longer divided against itself; a new corner-stone is built into the edifice of liberty, and those who now guard and support the structure accept without the mental reservation of their fathers the truth of its legend, that all men are created equal, and that governments are established among men to defend and protect their inalienable rights to life, liberty, and the pursuit of happiness. From henceforth in America there is in the inheritance of freedom no invidious distinction, no right of primogeniture; its blessings descend and its privileges are conferred impartially upon all, and all must assume its duties and bear their share in its responsibilities. If the duties shall be assumed with intelligence, and performed with rectitude; if the responsibilities shall be borne in the same spirit of justice and humanity which now finds expression in the Constitution, we may confidently believe and trust that, under the protection of Divine Providence, our institutions shall be perpetual. "The nation, under God, [has] a new birth of freedom, and [now] the government of the people by the people and for the people shall not perish from the earth."¹

¹ President Lincoln, at Gettysburg, Nov. 19, 1863. Holland's *Life of Lincoln*, 423; Raymond's *Administration of Lincoln*, 381; Draper's *Civil War*, III. 152; Lossing's *Civil War*, III. 80.

APPENDIX.

WHILE the last of the foregoing sheets were passing through the press, appeared the decisions of the Supreme Court in two exceedingly important cases, giving a construction to the three new amendments to the Constitution. The editor greatly regrets that his own work was so far advanced as to preclude their being made use of and freely copied from in the preparation of the text of his three supplementary chapters; but as the views he has expressed are fortunately in harmony with those opinions, perhaps the general purpose which would have been had in view in incorporating them in the body of the work, may be sufficiently accomplished by a reference to them here, and by liberal quotations from the most important. The leading case was that of *The Live Stock Dealers and Butchers Association v. The Crescent City Live Stock Landing and Slaughter House Company*, and was brought to the court by writ of error to the Supreme Court of Louisiana. A case in the circuit court involving the same questions is reported in 1 Abb. U. S. Rep. 388, to which a reference is made for the facts. In this place it will be sufficient to say that the plaintiff in error denied the right of the defendant in error to certain exclusive privileges which had been granted to the latter by the legislature of Louisiana, and which had been sustained by the Supreme Court of the State. The statute conferring these privileges, it is said by Mr. Justice Miller, delivering the opinion of the majority of the court, "is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens — the whole of the butchers of the city — of the right to exercise their trade, the business to which they have been trained, and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city."

The opinion proceeds to consider this position, and to discuss the question whether it is competent for a State to grant exclusive privileges, which it decides in the affirmative, and declares the right of the State courts to decide finally whether any such exclusive privileges are forbidden by the State constitutions. It then proceeds to say that the plaintiffs in error "allege that the statute is a violation of the Constitution of the United States in these several particulars: That it creates an involuntary servitude forbidden by the thirteenth article of amendment; that it abridges the privileges and immunities of citizens of the United States; that it denies to the plaintiffs the equal protection of the laws; and that it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of amendment. This court is thus called upon for the first time to give construction to these articles.

"We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far reaching and pervading in their consequences,

so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar ; we have discussed it freely and compared views among ourselves ; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us ; and beyond that we have neither the inclination nor the right to go."

After then making brief reference to the first twelve amendments to the Constitution, the court proceed to consider the last three.

"The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history ; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guaranties of human rights, additional powers to the federal government, additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt. The institution of African slavery as it existed in about half the States of the Union, and the contests pervading the public mind for many years between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort on the part of most of the States in which slavery existed to separate from the federal government and to resist its authority. This constituted the war of the rebellion ; and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

"In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose imposed servitude was the foundation of the quarrel. And when hard pressed in the contest, these men (for they proved themselves men in that terrible crisis) offered their services, and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the federal government, were not content to permit this great act of emancipation to rest on the actual results of the contest, or the proclamation of the Executive, both of which might have been questioned in after-times ; and they determined to place this main and most valuable result in the Constitution of the restored Union, as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated : —

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

"To withdraw the mind from the contemplation of this grand yet simple declara-

tion of the personal freedom of all the human race within the jurisdiction of this government, — a declaration designed to establish the freedom of four millions of slaves, — and with a microscopic search endeavor to find in it a reference to servitudes which may have been attached to property in certain localities, requires an effort, to say the least of it.

"That a personal servitude was meant, is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word 'servitude' is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West Indian Islands on the abolition of slavery by the English government, or by reducing the slaves to the condition of *serfs* attached to the plantation, the purpose of the article might have been evaded, if only the word 'slavery' had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase on a writ of *habeas corpus* under this article, illustrates this course of observation. *Matter of Turner* (1 Abb. U. S. R. 84). And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

"The process of restoring to their proper relations with the federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of these States in the legislative bodies which claimed to be in their normal relations with the federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

"They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient, or were not enforced.

"These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth article of amendment; and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

"Before we proceed to examine more critically the provisions of this amendment on which plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the

other two amendments, that notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were still inadequate for that protection to life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were made and administered by the white man alone. It was urged that a race of men distinctively marked, as was the negro race, living in the midst of another and dominant race, could never be fully secured in their persons and their property without the right of suffrage. Hence the fifteenth amendment, which declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The negro having by the fourteenth article been declared a citizen of the United States, is thus made a voter in every State of the Union.

"We repeat, then, in the light of this recapitulation of events almost too recent to be called history, but which are familiar with us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one prevailing purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment in terms mentions the negro by speaking of his color and his slavery; but it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the fifteenth.

"We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction; undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage, or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to have understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look always to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continual addition to the Constitution, until that purpose was supposed to be accomplished as far as constitutional law can accomplish it.

"The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States; no such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this court in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while

it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

"To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States and also citizenship of a State, the first clause of the first section was framed :—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

"The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State; and it overturns the *Dred Scott* decision by making all persons born within the United States, and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States, born within the United States.

"The next observation is more important, in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and continued. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it; but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those belonging to citizens of the several States. The argument, however, in favor of plaintiffs rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.

"The language is: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is a little remarkable if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the words 'citizens of the State' should be left out, when it is so carefully used, and used in contradistinction to citizen of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of a State as such, the latter must rest for their security and protec-

tion where they have heretofore rested, so far as this paragraph is concerned, for they receive no additional aid from it.

"The first occurrence of the words 'privileges' and 'immunities' in our constitutional history is to be found in the fourth of the articles of the old confederation.

"It declares 'that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States, and the people in each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.'

"In the Constitution of the United States which superseded the articles of confederation, the corresponding provision is found in section 2 of the fourth article in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

"There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the confederation we have some of these specifically mentioned, and enough, perhaps, to give some general idea of the class of civil rights meant by the phrase.

"Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington, in the circuit court for the district of Pennsylvania, in 1823. 4 Wash. C. C. R. 371.

"'The inquiry,' he says, 'is, What are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental, — which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'

"This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland* (12 Wallace, 430), while it declines to undertake an authoritative definition beyond what was necessary in that case. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right, for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

"In the case of *Paul v. Virginia* (8 Wallace, 180), the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States, under their constitutions and laws, by virtue of their being citizens.' The constitutional

provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States ; it threw around them in that clause no security for the citizen of the State where they were claimed or exercised, nor did it profess to control the power of the States over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights are, as you grant or establish them to your own citizens, or as you limit or qualify them, or impose restrictions on their exercise, the same, no more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

"It would be the vainest show of learning to attempt to prove by citations of authority that, up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the States, — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But, with these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the federal government.

"Was it the purpose of the framers of the fourteenth amendment, by the simple declaration that no State shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the federal government ? And where it is declared that Congress shall have power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States ?

"All this and more must follow if the proposition of plaintiffs in error be sound ; for not only are these rights subject to the control of Congress whenever, in its discretion, any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and resisting the exercise of legislative power by the States in their most ordinary and usual functions, as in its judgment or discretion it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions ; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character ; when, in fact, it radically changes the whole theory of the relations of the State and federal governments to each other, and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses this purpose too clearly to admit of doubt.

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

"Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining

the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. No case in this court until that of *Ward v. Maryland*, in 1872, required a consideration of those words as used in the original constitution in reference to citizens of the States; and it may be long before we are called upon to furnish a definition of the term as applying to citizens of the United States. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its essential character, its constitution or its laws.

"One of these is well described in the case of *Crandall v. Nevada* (6 Wallace, 36). It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land-offices, and courts of justice in the several States.' And, quoting from the language of Chief Justice Taney, in another case, it is said, 'that for all the great purposes for which the federal government was established we are one people, with one common country. We are all citizens of the United States;' and it is as such citizens that their rights are supported in this court in *Crandall v. Nevada*.

"Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas, or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territories of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is, that as a citizen of the United States any person can, of his own volition, become a citizen of any State of the Union by acquiring a residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth amendments, and by the other clause of the fourteenth next to be considered.

"But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, even if they exist, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

"'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The argument has not been much pressed in these cases, that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the laws. The first of these paragraphs has been in the federal Constitution since the adoption of the fifth amendment as a restraint upon the federal power. It is also to be found in some form of expression in the con-

stitutions of nearly all the States as a restraint upon the power of the States. The law then has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the federal government.

"We are not without judicial interpretation, therefore, both State and national, of the meaning of this clause. It is sufficient to say here that under no construction of the third provision that we have ever seen, nor any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trades by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws, in the States where the newly-emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. But if the States did not conform their laws to its requirements, then by the fifth section of the article Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall demand a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again as it may have relation to this particular clause of the amendment.

"In the early history of the organization of the government its statesmen seem to have divided on the line which should separate the powers of the national government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

"The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense, at that time, of danger from the federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the general government. Unquestionably this has given great force to the arguments, and added largely to the numbers, of those who believe in the necessity of a strong national government.

"But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to disturb the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States, with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation.

"But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand, the balance between State and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts."

The other case to which reference has been made was that of *Bradwell v. The State of Illinois*. The plaintiff in error was a woman, and had applied to the State court for examination as to her qualifications for admission to the bar. The court had denied the application, on the ground that only men could be licensed to practise under the State law; and the case came before this court on the claim that the plaintiff had been denied a privilege secured to her by the Constitution of the United States. After a statement of the case, the court proceed to say: "Three propositions may be considered properly before this court. As regards the provision of the Constitution that citizens of each State shall be entitled to all the rights and immunities of citizens in the several States, the plaintiff in her affidavit has stated very clearly her case, to which it is inapplicable. The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State where the laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislature. The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont. While she remained in Vermont that circumstance made her a citizen of that State, but she states at the same time that she is now a citizen of the United States, and that she is now and has been for many years past a resident of Chicago, in the State of Illinois. The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore plaintiff was at the time of her application a citizen of the United States and a citizen of the State of Illinois. We do not here mean to say that there may not be temporary residence in one State with intent to return to another, which will not create citizenship in the former; but the plaintiff states nothing to take her case out of the definition of citizenship of the State as defined by the first section of the fourteenth amendment.

"In regard to the fourteenth amendment, the counsel for the plaintiff in this case truly says that there are privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them; and he proceeds to argue that admission to the bar of the State of a person who possesses the requisite learning and character is one of those which the State may not deny. In this latter proposition we are not able to concur with the counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States in that relation and character, and that it is these, and these alone, which a State is forbidden to abridge. But the right to admittance to practise law in the court of a State is not one of these. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend upon citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in State and federal courts, who were not citizens of the United States or of any State. But on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of a State, and as to the federal courts, it would relate to citizenship of the United States. The opinion delivered in the slaughter-house cases from Louisiana ren-

ders an elaborate argument in the present case unnecessary, for unless we are wholly and radically mistaken in the principles on which these cases are decided, the right to control and regulate the granting of license to practise law in the courts of a State is one of those powers which are not transferred for its protection to the federal government, as its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license. It is unnecessary to repeat the argument on which the judgment on these cases is founded. It is sufficient to say they are conclusive of the present case. The judgment of the State court is therefore affirmed."

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